TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS,

vs.

THE ALTON RAILROAD COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED { MAY 29, 1941. / JULY 12, 1941.

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IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THE ALTON RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Chicago and North Western Railway Company; Chicago Burlington & Quincy Railroad Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company; The Denver and Salt Lake Railway Company; Duluth, Winnipeg and Pacific Railway; Great Northern Railway Company; Illinois Central Railroad Company; Kansas City Southern Railway Company; L. C. Sprague, Receiver of The Minneapolis and St. Louis Railroad Company; G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri and Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company; Northern Pacific Railway Company; J. M. Kurn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company; Berryman Henwood, Trustee of St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; Norman B. Pit-
[fol. 5] cairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company; T. M. Schumacher and Sidney M. Ehrman, Trustees of The Western Pacific Railroad Company; Illinois Terminal Railroad Company; Litchfield and Madison Railway Company; Grand Trunk Western Railway Company; The New York Central Railroad Company; The Chesapeake & Ohio Railway Com-

pany; Detroit, Toledo and Ironton Railroad Company; C. E. Denney and John A. Hadden, Trustees for Erie Railroad Company; Chicago and Erie Railroad Company; The Colorado and Southern Railway Company; John T. Cochrane, Jr., Trustee of Alabama, Tennessee & Northern Railroad Corporation; Apalachicola Northern Railroad Company; Atlanta, Birmingham and Coast Railroad Company; Atlanta & Saint Andrews Bay Railway Company; Atlanta and West Point Rail Road Company; Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway; H. D. Pollard, Receiver of Central of Georgia Railway Company; Charleston & Western Carolina Railway Company; Columbia, Newberry and Laurens Railroad Company; Columbus and Greenville Railway Company; Danville and Western Railway Company; W. R. Kenan, Jr., and S. M. Loftin, Receivers of Florida East Coast Railway Company; W. V. Griffin and H. W. Purvis, Receivers of Georgia & Florida Railroad; The Georgia Northern Railway Company; Georgia Railroad; Gulf and Ship Island Railroad Company; Gulf, Mobile and Northern Railroad Company; Interstate Railroad Company; Louisville and Nashville Railroad Company; Macon, Dublin & Savannah Railroad Company; Mississippi Central Railroad Company; C. E. Ervin and T. M. Stevens, Receivers of Mobile and Ohio Rail Road Company; The Nashville, Chattanooga & St. Louis Railway; Norfolk and Western Railway Company; Morris S. Hawkins and L. H. Windholz, Receivers of Norfolk Southern Railroad Company; Piedmont and Northern Railway Company; Savannah and Atlanta Railway Company; L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company; Southern Railway System; Tennessee, Alabama and Georgia Railway; [fol. 6] Tennessee Central Railway Company; The Western Railway of Alabama; Winston-Salem Southbound Railway Company; The Yazoo and Mississippi Valley Railroad Company, Plaintiffs,

v.

United States of America; Interstate Commerce Commission; and John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, Defendants

COMPLAINT—Filed July 14, 1939

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan:

For their complaint, plaintiffs state:

1

The plaintiffs are common carriers of property by railroad, and are, as stated in the title of this action, corporations duly organized and existing or trustees or receivers, duly appointed and qualified, of railroad corporations.

[fol. 7] 2

The defendant, John P. Fleming, is an individual doing business under the firm name and style of John P. Fleming Driveaway Service, and his residence is in the City of Detroit, Wayne County, Michigan.

3

This is a civil action, under Paragraph 28, Section 24, Judicial Code (28 U. S. C. 41 (28)). To enjoin and annul an order of the Interstate Commerce Commission, as hereinafter more fully appears.

4

The defendant, John P. Fleming, doing business as John P. Fleming Driveaway Service, filed application with the Interstate Commerce Commission on February 12, 1936, for authority under the so-called "grandfather clause" of Section 206 (a) of the Motor Carrier Act, 1935 (49 U. S. C. 306 (a)), to wit:

"Provided, however, that, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * The Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is

made to the Commission as provided in paragraph (b) of this section and within one hundred twenty days after this section shall take effect."

to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles between points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington, over irregular routes.

5

The plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application before the Examiner to whom said application was referred for hearing.

[fol. 8] 6

The report of the Examiner was served on September 10, 1937, and the plaintiffs filed timely exceptions to said report. The Interstate Commerce Commission, by Division 5, Commissioners Eastman, Lee, and Rogers, filed its report and order on September 19, 1938 (8 M. C. C. 469), and copies of said report and order are hereunto annexed, marked Exhibits A and B, respectively. Thereafter, plaintiffs filed a petition for reargument and reconsideration by the entire Interstate Commerce Commission of the said report and order of the Commission by Division 5. On December 5, 1938, the Commission denied said petition. Thereafter, after the decision of the Supreme Court of the United States in *McDonald* v. *Thompson* on December 5, 1938, plaintiffs filed a supplemental petition for reargument and reconsideration by the entire Commission of said report and order, and said supplemental petition was denied on March 6, 1939.

7

One or more of the plaintiffs are engaged in carrying, or are participating in the carriage of, new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate commerce, from Detroit, Michigan, for delivery to all points in the states into which said defendant

is authorized to operate by said report and order, and are competitors of said defendant for said traffic, and are prejudiced and injured by said report and order.

8

In making said report and order the Commission exceeded its lawful authority and erred in its construction and application of the Motor Carrier Act, 1935, in that part of said report and order which is the following:

"We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new [fol. 9] automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation. * * *."

"Upon compliance by applicant with the requirements of Sections 215 and 217 of the Act, and our rules and regulations thereunder, an appropriate certificate will be issued."

in the following respects:

(a) In that the evidence before the Commission fails to show that said defendant was engaged on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce from Detroit, Michigan, on the one hand, to all points in any of the following states: Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand.

(b) In that said evidence fails to show that said defendant was engaged on June 1, 1935, and has been so engaged since that time, as a common carrier by motor vehicle in

driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to any points other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia, Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

(c) In authorizing said defendant to serve all points in the states to which service is authorized by said report and order, in that said evidence fails to show that said defendant [fol. 10] was engaged on June 1, 1935, and has been engaged since that time, in transporting said vehicles or chassis from Detroit, Michigan, on the one hand, to more than two points in any of said states.

(d) In holding upon the following finding or conclusion:

"Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, New York, Pennsylvania, and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia."

and the evidence before the Commission, that said defendant is entitled to a certificate of public convenience and necessity to serve all points in the states to which service is authorized by said report and order.

(e) In holding that said defendant, by serving one or a few points in a state on and since June 1, 1935, is entitled to a certificate of public convenience and necessity to serve all points in the state.

(f) In authorizing said defendant to serve any point in the state of Oregon, because said evidence shows that said defendant was on and prior to June 1, 1935, operating into and in said state as a contract carrier and not as a common carrier, and has so operated since that time as a contract carrier and not as a common carrier.

(g) In authorizing said defendant to serve any point in the states of Oregon, California, Arkansas, and Texas, be-

cause said evidence fails to show that said defendant was on June 1, 1935, complying with, and since that time has complied with, the laws of said states which regulate, license, and tax his operations on the public highways; but on the contrary the evidence shows that said defendant did not comply, and has not complied, with said laws at said times.

(h) In authorizing said defendant to operate over irregular routes in the states designated in said report, because [fol. 11] said evidence shows that on and prior to June 1, 1935, and since that time, said defendant was operating over regular routes in said states.

(i) In authorizing said defendant to operate through the states of Idaho, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Wyoming, because said evidence fails to show that said defendant was on June 1, 1935, and prior thereto, complying with, and since said time has complied with, the laws of said states which regulate, license, and tax his operations on the public highways, but on the contrary the evidence shows that said defendant did not comply, and has not complied, with said laws at said times.

9

The Commission exceeded its lawful authority, and erred, in failing to hold that the defendant, John P. Fleming, was required to prove, and had the burden of proof to establish, that he was operating on June 1, 1935, and has operated since that time, in compliance with the laws regulating licensing, and taxing his use of the public highways of the States of Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, Washington, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming.

10

The Commission exceeded its lawful authority, and erred, in admitting or considering as evidence upon which to base its order, what is described in said report as an "exhibit purporting to show additional transportation he had performed," for the reasons that the same is hearsay, and a self-serving declaration, and no opportunity was afforded plaintiffs to cross-examine said defendant with reference to the same, and no copy thereof was furnished to plaintiffs.

[fols. 12-13] Wherefore, plaintiffs pray:

(1) That a District Court of three judges be organized as provided in Title 28, U. S. C., section 47, to hear this cause.

(2) For interlocutory injunction restraining the defendant, John P. Fleming, from operating under the authority of said order of the Interstate Commerce Commission, and from carrying on any of the operations authorized or described in said report and said order.

(3) That upon final hearing said order be annulled and the defendant John P. Fleming be permanently enjoined from carrying on any of the operations authorized or described in said report and said order.

(4) That plaintiffs have all other relief to which they may be entitled, and that they may recover costs.

Henry P. Stacy, Michigan Central Terminal Bldg., Detroit, Michigan; Frederick V. Slocum, 441 E. Jefferson Ave., Detroit, Michigan; Joseph H. Hays, Richard W. Sharpless, Amos M. Mathews, 204 South Canal St., Chicago, Illinois, Attorneys for Plaintiffs.

Duly sworn to by Henry P. Stacy, jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

No. MC-48654

John P. Fleming Common Carrier Application

Submitted January 19, 1938. Decided September 19, 1938

Applicant found entitled to continue operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis from Detroit, Mich., to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, over irregular routes through the States of

Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming, by reason of having been engaged in such operation on June 1, 1935, and having continued such operation since that time. Certificate granted. Application denied in all other respects.

Carney D. Matheson and *George S. Dixon*, for applicant.

Daniel C. Rogers for Public Service Commission of Missouri.

Joseph H. Hayes and *Frederick V. Slocum* for protestants.

K. F. Clardy, Louis E. Smith, Bernard W. Butler, George M. Kellogg, Jr., J. F. Diskin, George B. Wright, Henry P. Stacy, E. F. Moberg, S. E. Gregory, R. P. DeCamp, L. S. Harris, Julius Weiss, and *George A. Dougher* for interveners.

Report of the Commission

Division 5, Commissioners Eastman, Lee, and Rogers

By Division 5:

Exceptions were filed to the recommended order of the examiner to whom the matter was referred, and oral argument was had. Our conclusions differ in some respects from those recommended.

By application,[1] as amended, filed February 12, 1936, John P. Fleming, of Detroit, Mich., doing business as John P. Fleming Driveaway Service, seeks authority to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles between points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington, over irregular routes. The Public Service Commission of Missouri intervened in opposition to the granting of the application. The Railroad Commission of Texas protested [fol. 15] the granting of the application, but was not represented at the hearing. National Automobile Transporters Association, Automobile Contract Carriers Association, and International Harvester Company intervened and pre-

[1] Under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935.

sented testimony on questions relating to jurisdiction. Numerous motor carriers of automotive vehicles, individuals, Nicholson Universal Steamship Company, Detroit-Cleveland Navigation Company and Central Freight Association, western, and southern rail lines, and numerous railroads entered appearances at the hearing, but did not present any evidence.

Applicant's operations were conducted on June 1, 1935, solely by the driveaway or caravaning method of transporting motor vehicles. By this method, the transportation is performed by (1) individual driving of the vehicle under its own power; (2) driving one vehicle under its own power and towing a second vehicle attached to the first by a mechanical device generally called a tow-bar; (3) by bolster mount or full mount which consists of driving one vehicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or combinations of both.

These methods of conveying the traffic suggest the desirability of a brief discussion of whether the transportation performed is within the jurisdiction conferred upon us by the Act. As indicated below, no question appears to exist so far as towing of a vehicle is concerned. The dictionary definition,[2] in a limited sense, however, leaves the impression that "transportation" may be something other than the movement of an automotive vehicle under its own power. Corpus Juris defines "transporting" as follows:

> As commonly understood, one is transporting an article when he is conveying it from one place to another. Transporting includes towing.

In their interpretation of federal statutes making transportation of a stolen motor vehicle, in interstate commerce, a criminal offense, the courts have uniformly held in sustaining convictions that driving of the vehicle under its own power is transportation. See *Whitaker* v. *Hitt*, 285 F. 797, *Hostetter* v. *United States*, 16 F. (2d) 921, and *Piper* v.

[2] Act of transporting, or state of being transported; carriage; removal; conveyance—Webster's New International Dictionary. Under the definition of "Convey", this authority asserts that the synonym "transport" implies an actual carrying, as by vehicle or vessel.

Bingamon, 12 F. Supp. 755. We conclude that the methods followed by a- applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

Under part I, we have consistently regarded the movement over other than the owning railroad of locomotives under their own power as transportation. Tariff rates for such transportation are provided by rail carriers, and in certain instances we have approved a basis of rates therefor. See *Investigation and Suspension Docket No. 23*, 21 I. C. C. 103, and *Locomotives from and to the South*, 211 I. C. C. 114.

Applicant's documentary evidence of operation consists of certain shipping records of the transportation of passenger vehicles and trucks from the factories of automobile manufacturers in Detroit, Mich., to various points in the States covered by the application. No shipments are shown as having originated at a point other than Detroit. After the hearing, pursuant to permission granted by the examiner, applicant also submitted an exhibit purporting to show additional transportation he had performed. No copies of billing or other documentary evidence were furnished in support of this exhibit.

[fol. 16] The evidence described indicates that applicant commenced operations during the first part of the year 1933, from which time July 1936, applicant transported, or participated in the transportation of, more than 2,100 vehicles. The shipping papers introduced cover approximately 400 of these vehicles. The shipments consisted of from 1 to 16 vehicles, although shipments of 2 and 4 vehicles by far exceed shipments of any other quantities. Certain of the shipments covered by documentary evidence were transported by the driveaway method from the plants in Detroit to the docks of steamship lines in that city for transshipment by water to interstate destinations. The record is silent, however, as to whether this transportation was a part of a through shipment, effected by joint transportation of two carriers under common control, management, or arrangement, and whether this transportation is subject to our jurisdiction cannot therefore be determined at this time, it also appears from the testimony that applicant transported used cars in interstate commerce between vari-

ous points in the States covered by the application. Transportation of this character is not supported by documentary evidence, and the oral testimony does not warrant the conclusion that it was other than sporadic or that applicant was regularly engaged in such transportation. Certain new cars were returned to Detroit for various reasons. The return of vehicles refused by distributor or dealer would appear to be a necessary incident to the business in which applicant is engaged.

Applicant urges that authority to serve all points in the States covered by the application is essential to the business conducted. The operation in each State in which transportation is claimed to have been performed is outlined below. The figures given include both the shipments, proof of which is established by shipping papers, and the shipments listed on the exhibit submitted after the hearing.

Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, New York, Pennsylvania, and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia.

As to the States other than California, New York, Pennsylvania, Arkansas, Texas, Oregon, and Washington, applicant transported numerous shipments to the points served. Only two shipments were transported to California, these being to San Jose on August 14, 1934, and to Los Angeles on May 22, 1935; to Pennsylvania points, the shipments consisted of two movements one to Pittsburgh on May 7, 1935, the other to Warren on April 18, 1935; to New York points the two shipments handled moved to Buffalo on April 22, 1935, and to Cortland on May 12, 1935. After June 1, 1935, only one shipment was transported to New York or Pennsylvania points. In response to a question concerning operations to New York and Pennsylvania points, applicant stated that he had not regularly held himself out as engaged in performing transportation to those States. No shipping papers covering movements to California, New York, and Pennsylvania were submitted, and there is very little testimony relative thereto. Operations to Arkansas, Texas, Oregon, and Washington were not

started until 1935. It appears, however, that by June 1, 1935, a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles.

It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufac- [fol. 17] turer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1,200 vehicles were transported by applicant in the period from January 1934, to June 1935, yet relatively few points were served. This further indicates that applicant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and supporting data based upon which it is estimated that in the year 1935, less than seven per cent of all new automobiles sold in twenty-four western States were transported by the driveaway method.

As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area; dealers' accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the act, the provisions of which require in substance that the authority granted shall per-

mit a carrier to conduct the bona fide operations it was conducting on June 1, 1935. *In Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, we said that: "In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the 'grandfather' clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting 'grandfather' certificates to haul 'general commodities', that each and every commodity within that description has actually been carried. The question is whether there has been operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business." It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles.

Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally.

Question is raised as to whether applicant has operated as a common or contract carrier. The evidence indicates that the business performed was obtained by solicitation of dealers and distributors engaged in merchandising automotive vehicles; that applicant would transport for anyone requesting him to do so; that he held himself out to transport by the driveaway method between any points in the States for which application is made; and that he has no written contracts. The plan of operation outlined contains all the incidents of common carriage.

Protesting rail carriers contend that applicant's operations were not bona fide in character because he failed to procure certificates from the States through or into which he conducted operations. Applicant, however, made inquiry as to certificate requirements of the States and he testified that to the best of his information certificates were

not required with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska.

[fol. 18] The Missouri Public Service Commission decided on December 24, 1935, that a carrier such as applicant was subject to a Missouri law, approved in 1929, designed to regulate common and contract carriers by motor vehicle. Upon being informed of the certificate requirements in Missouri, applicant discontinued transportation over the highways of that State. It is urged that applicant's failure to continue the transportation of automobiles over highways through the State of Missouri operates as a forfeiture of rights in that State under the "grandfather" clause. The provision of the act in question, however, deals only with interruption of "service"; since applicant did not serve any point in Missouri, no issue under the provision referred to is involved. Applicant had operated over highways through Missouri in making deliveries to Texas points. He stated, in this connection, that deliveries to the Texas points can be made by the use of highways through Kentucky and Arkansas and that the highways through these States offer a quite satisfactory route. Operations begun over routes through Kentucky and Arkansas after the statutory date raise no issue under the "grandfat' '" clause, as there was no change in the territory serv Since the authority herein granted does not limit applicant to operation over specified routes and in view of our interpretation of the Act with respect to the provisions thereof relating to "interruptions of service," it is further our view that the application so far as it requests authority to operate in interstate commerce over Missouri highways should be granted. Compliance by applicant with the applicable laws of Missouri is a matter that rests between applicant and the State authorities.

Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to

take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operations have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing.

The operations proved in the States of New York and Pennsylvania do not afford justification for the granting of a certificate. On the showing made as to deliveries to New York and Pennsylvania points, it could be that shipments to these points were included with the vehicles delivered by applicant for lake movement beyond the Detroit docks. In any event, the New York and Pennsylvania operations would not establish a valid claim to grandfather rights. Although operations to Arkansas, Texas, Oregon, and Washington were started just prior to June 1, 1935, they were sufficient in scope to establish that applicant was in bona fide operation to those States on the statutory date. As to the other States claimed, we view the transportation performed as justifying the authority sought.

We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes [fol. 19] through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the con-

tinuance of this operation. As an incident to the operation, applicant may transport to Detroit from any point in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor. The application in other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent that issuance of a certificate is authorized by our findings herein.

EXHIBIT "B" TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 19th day of September, A. D. 1938

No. MC-48654

John P. Fleming Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That the said application be, and it is hereby, denied, effective October 26, 1938, except to the extent that the issuance of a certificate of public convenience and necessity is authorized by the findings in said report.

And it is further ordered, That applicant be, and he is hereby, notified and required to cease and desist, on or before October 26, 1938, from operations as a motor carrier covered by said application other than those authorized in said report.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT JOHN P. FLEMING—Filed August 4, 1939

Now comes John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, so impleaded as one of the defendants in the above entitled cause, and in answer to the plaintiffs' Complaint in the above entitled cause, says:

1

Answering paragraph 1 of the plaintiffs' Complaint, this defendant neither admits nor denies the allegations therein contained, having insufficient information upon which to form a belief as to the truth of such averments and, therefore, leaves the plaintiffs to their proof.

2

Answering paragraph 2 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

3

Answering paragraph 3 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

[fol. 21] 4

Answering paragraph 4 of the plaintiffs' Complaint, this defendant admits that on or prior to February 12, 1936, he filed an application with the Interstate Commerce Commission for authority under the so-called "grandfather clause" of Section 206(a) of the Motor Carrier Act, 1935 (49 U. S. C. 306(a)), reading substantially in the language set forth in paragraph 4 of plaintiffs' Complaint, to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles over irregular routes, but this defendant denies that the designation of the territory requested in said application is correctly set forth in paragraph 4 of the plaintiffs' Complaint and in support of such denial alleges the fact to be that authority was sought

by the applicant in such application to serve all points and places in the states of Michigan, Tennessee, Georgia, Alabama, Texas, Oregon, Kentucky, North Carolina, South Carolina, Arkansas, Washington, California passing through but not serving the states of Idaho, Nebraska, Colorado, Wyoming, Oklahoma, Illinois, Ohio, Utah, Nevada, Iowa, Kansas, Missouri, Indiana, Virginia.

5

Answering paragraph 5 of the plaintiffs' Complaint, this defendant admits that some of the named plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application before the examiner to whom said application was referred for hearing, but this defendant neither admits nor denies that all of the plaintiffs herein so appeared in intervention or in opposition, having [fol. 22] insufficient information upon which to form a belief by reason of the fact that the record made at said hearing does not disclose with particularity the individual identity of some of the rail carriers for whom an appearance was entered and, therefore, leaves the plaintiffs to their proof.

6

Answering paragraph 6 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

7

Answering paragraph 7 of the plaintiffs' Complaint, this defendant denies that the plaintiffs are prejudiced and injured by said report and order of the Interstate Commerce Commission, and in support of such denial alleges the fact to be that said report and order merely confirmed operating authority already granted to this defendant under the terms and provisions of the Motor Carrier Act, 1935, and merely ratified operations then being conducted by this defendant, which operations had been instituted many years before and had been continuously conducted thereafter. As to the remaining allegations contained in paragraph 7 of the plaintiffs' Complaint, this defendant neither admits nor denies the same, having insufficient information upon which to form a belief as to the truth of such averments and, therefore, leaves the plaintiffs to their proof.

8

Answering paragraph 8 of the plaintiffs' Complaint, this defendant denies each and every allegation therein contained to the same effect as if each allegation was separately denied, and in support of such denial alleges the fact to be:

(a) That the evidence before the Commission did show that this defendant was engaged on June 1, 1935, and had been so engaged since that time to the date of hearing in bona fide operation as a common carrier by motor vehicle [fol. 23] in driveaway service of the commodities indicated, to all points located within the therein designated territory, within the meaning of the terms and provisions of the Motor Carrier Act, 1935.

(b) That the evidence shows that this defendant, during the period indicated, was engaged in the operations therein described from Detroit, Michigan, to many points other than those designated in paragraph 8, sub-paragraph (b), of the plaintiffs' Complaint.

(c) That the evidence shows that this defendant was engaged in such transportation service between Detroit, Michigan, and more than two points in all of the states above designated within the meaning and terms and provisions of the Motor Carrier Act, 1935.

(d) That the finding by the Commission and the evidence presented fully supports the grant of authority as contained in said order.

(e) That the Commission's holding was proper under the terms and provisions of the Motor Carrier Act, 1935.

(f) That the evidence supports the finding that this defendant was engaged in service to the State of Oregon as a common carrier rather than as a contract carrier.

(g) That the evidence of record indicates that this defendant made every effort to comply with any and all requirements made upon him by the states therein designated.

(h) That the evidence of record clearly indicates that the operations conducted by this defendant, by their inherent nature, required operations over irregular routes.

(i) That the evidence of record indicates that this defendant made every effort to comply with all requirements made of him by the states through which he operated and does [fol. 24] not indicate a failure by this defendant to comply with such regulations.

9

Answering paragraph 9 of the plaintiffs' Complaint, this defendant denies the allegations therein contained and in support of such denial alleges the fact to be that this defendant assumed the burden of proving and did prove that he was complying with the laws of the states through which his operations were conducted thereby removing the necessity for any such ruling.

10

Answering paragraph 10 of the plaintiffs' Complaint, this defendant denies the allegations therein contained and in support of such denial alleges the fact to be that the official record of proceedings taken at said hearing will show that counsel for this defendant made an offer to furnish additional information following the hearing; that the examiner made a ruling that such information could be furnished if satisfactory; and that counsel for railroad protestants stated that this arrangement would be satisfactory.

11

Furthe answering the plaintiffs' Complaint, this defendant moves this Honorable Court to dismiss the plaintiffs' Complaint for and upon the following assigned grounds and reasons:

(1) Because the plaintiffs' Complaint does not state a cause of action.

(2) Because the plaintiffs' Complaint does not show, upon its face, grounds for the relief therein sought.

(3) Because the plaintiffs herein are not proper parties in interest to the proceedings under attack in the plaintiffs' Complaint.

(4) Because the plaintiffs herein are in no way prejudiced or damaged by the entry of the Interstate Commerce Com- [fol. 25] mission order under attack in the Complaint.

Wherefore, this defendant prays: That an Order may be entered by this Honorable Court dismissing the plaintiffs'

Complaint herein and granting to this defendant all other relief to which he may be deemed entitled, and granting to this defendant all costs incurred in his defense of this action.

(Signed) John P. Fleming. So Impleaded as one of the defendants.

Carney D. Matheson, George S. Dixon, Edmund M. Brady, Attorneys for defendant,

John P. Fleming, 2280 Penobscot Bldg., Detroit, Michigan. Telephone No. RA-8590.

Dated: Detroit, Michigan, August 4th, 1939.

Duly sworn to by George S. Dixon. Jurat omitted in printing.

[fol. 26] To Mr. Henry P. Stacy, Attorney for Plaintiffs, 314 Michigan Central Terminal Bldg., Detroit, Michigan:

Please take notice that the Motion set forth in paragraph 11 of the Answer of the Defendant, John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, will be brought on for hearing at the trial of this cause on its merits, or at such prior time as the court may, in its discretion, order, or at such time as any of the parties hereto may, by proper notice under the rules and practice of this court, direct.

(Signed) George S. Dixon, Attorney for John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service.

Dated: Detroit, Michigan, August 4, 1939.

[fol. 27] In the District Court of the United States

[Title omitted]

Answer of the United States—Filed Aug. 11, 1939

First Defense

Defendant, United States of America, for its First Defense to the complaint says:

I

No one of the plaintiffs hereto has any legal interest which is affected or violated by the orders of the Interstate

Commerce Commission complained of by the bill, and hence no one of them has any standing to maintain this action.

II

The bill fails to show or allege that any one of the plaintiffs has any property or other legal right which is or will be affected by the said orders of the Interstate Commerce Commission.

III

The said orders of the Commission are not directed against the plaintiffs or any one of them and make no requirements whatever of the plaintiffs or any one of them.

[fol. 28] IV

The bill of complaint fails to allege facts showing that the said orders in any way prejudice or damage said plaintiffs or any one of them.

V

The bill of complaint wholly fails to allege facts sufficient to constitute a cause of action against the United States wherefor- this defendant moves that the bill of complaint be dismissed and prays that an order be entered accordingly.

Second Defense

This defendant for its Second Defense to the bill of complaint says:

I

Defendant admits the allegations of paragraphs 1, 2, 3, and 6 of the bill of complaint; and denies each and every allegation of paragraphs 8, 9, and 10 of the complaint.

II

Answering paragraph 4, defendant admits that John P. Fleming, doing business as John P. Fleming Driveaway Service, filed an application with the Interstate Commerce Commission on February 12, 1936, under the so-called

"Grandfather Clause" of section 206(a) of the Motor Carrier Act of 1935 (49 U. S. C. 306(a)), but denies that the allegations of paragraph 4 sufficiently or accurately describe such application, and for a further and accurate description thereof this defendant respectfully refers the Court to the description of such application in the report of the Interstate Commerce Commission attached as Exhibit A to the bill of complaint and to the original application made a part of the record before the Interstate Commerce Commission.

[fol. 29] III

Answering paragraph 5, defendant admits that some of the named plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application, but this defendant neither admits nor denies that all the plaintiffs herein so appeared in intervention or in opposition, having insufficient information upon which to form a belief by reason of the fact that the record made at said hearing does not disclose with particularity the individual identity of some of the rail carriers for whom an appearance was entered.

IV

Answering paragraph 7, defendant denies that the plaintiffs or any of them are prejudiced or injured by the report and order of the Interstate Commerce Commission. Defendant neither admits nor denies the remaining allegations of paragraph 7, having insufficient information upon which to form a belief as to the truth of such averments.

V

Further answering paragraphs 4, 5, 6, 7, 8, 9, and 10, defendant admits and alleges that pursuant to the application filed with it by John P. Fleming, doing business as John P. Fleming Driveaway Service, as aforesaid, the the Commission set the matter down for hearing before an examiner under the title "Docket No. MC-48654, John P. Fleming, Common Carrier Application"; that in said proceeding the parties thereto, including such of the plaintiffs as intervened therein, were accorded a full hearing; that in such hearing a large volume of testimony and other

evidence bearing upon the matters put in issue by the said application were submitted to the Commission for consideration; that at said hearing and subsequently, by exceptions filed to the recommended order of the examiner, and [fol. 30] briefs in respect to the same, questions relating to said issues were fully presented to the Commission for determination on behalf of the parties by their respective counsel, whereupon the Commission determined said issues and entered and duly served upon the parties to said proceeding its report and order of September 19, 1938, copies of which are annexed as Exhibits A and B, respectively, to the bill of complaint; that thereafter plaintiffs filed a petition for reargument and reconsideration by the full Commission of the said report and order and that on December 5, 1938, the Commission denied said petition; that thereafter plaintiffs filed a supplemental petition for reargument and reconsideration by the full Commission of said report and order and said supplemental petition was denied by the Commission on March 6, 1939. The defendant further alleges that findings and conclusions of the Commission in said report were fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said report and order the Commission considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance, and consideration called to its attention on behalf of parties to said proceeding, including the matters covered by the complaint herein. Defendant further alleges that the said orders of September 19, 1938, December 5, 1938, and March 6, 1939, were not made or entered either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support them; that in making said orders the Commission did not exceed its authority nor violate any legal or constitutional right of the plaintiffs and defendant denies each and every allegation to the contrary contained in said complaint. Insofar as the allegations of the bill of complaint are consistent with, and are disclosed by, the record before the Commission and its report and order, they are admitted; insofar as they are inconsistent therewith and are undisclosed thereby they are denied.

[fol. 31] VI

Except as herein above expressly admitted, defendant denies the truth of each and every allegation contained

in the complaint insofar as they conflict either with the allegations herein or with the statements or conclusions set out in the Commission's said report of September 19, 1938.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
John C. Lehr, by J. Thomas Simms, United States Attorney, Detroit, Michigan.
Thurman Arnold, Assistant Attorney General.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT INTERSTATE COMMERCE COMMISSION—Filed Aug. 24, 1939

The Interstate Commerce Commission, defendant in the above-entitled cause, hereinafter designated the Commission, for its answer to the complaint herein, says:

I

Answering paragraphs 1 to 7, inclusive, of the complaint, the Commission, for the purposes of this suit and for none other, admits that the allegations in said paragraphs are true, except (a) that the Commission denies that the allegations of paragraph 4 of the complaint relative to the substance and effect of the application made to the Commission by defendant Fleming on February 12, 1936, constitute a [fol. 33] full, true or correct statement as to said application, and the Commission respectfully refers the Court to the second paragraph of its report of September 19, 1938, Exhibit A to the complaint herein, for such information, and (b) that the Commission denies the allegation of paragraph 7 of the complaint relative to prejudice and injury to plaintiffs, and denies that any legal damage will result to plaintiffs because of the Commission's report and order.

II

Answering paragraphs 8 to 10, inclusive, of the complaint, the Commission admits and alleges that it made its report and order of September 19, 1938, true copies of which are attached as Exhibits A and B to the complaint herein, in a proceeding pending before it entitled No. MC

48654, *John P. Fleming Common Carrier Application.* The Commission further alleges that in said proceeding the parties thereto, including certain of the plaintiffs herein, appeared and were accorded the full hearing provided for in and by the statutes applicable thereto; that in said hearing a large volume of testimony and other evidence bearing upon the matters in issue was submitted to the Commission for consideration, and that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to the matters in issue were fully argued and submitted to the Commission for determination on behalf of said parties, including some of the plaintiffs herein, whereupon the Commission determined the questions in issue and entered and duly served upon all parties to the proceeding and other interested parties, its said report and order; that said report and order included the Commission's findings, decision, conclusions, order and [fol. 34] requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order are based.

The Commission further alleges that said findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by law and by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges and states that in making said report and order it considered and weighed carefully, in the light of its knowledge and experience, each fact, circumstance and condition presented by said evidence and by the arguments and briefs of all the parties to said proceeding, including such parties thereto as are plaintiffs herein.

The Commission further alleges that said order was not made or entered either arbitrarily or unjustly or contrary to the law or to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said complaint.

III

Further answering said complaint, the Commission specifically denies that unless its said order is set aside plaintiffs will suffer loss or damage.

Except as herein expressly admitted the Commission denies the truth of each of and all the allegations contained in the complaint.

[fol. 35] Wherefore, having fully answered, the Commission prays that the complaint be dismissed.

Interstate Commerce Commission, By Nelson Thomas, Attorney, 3328 Interstate Commerce Bldg., Washington, D. C., J. Stanley Payne, Acting Chief Counsel, of Counsel.

[fol. 36] City of Washington,
District of Columbia, ss:

John L. Rogers, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, defendant in the above-entitled cause, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

John L. Rogers.

Subscribed and sworn to before the undersigned, a Notary Public in and for the District of Columbia, this 21st day of August, 1939. J. Forney Donaldson, Notary Public. My commission expires Sept. 14, 1943.

[fol. 37] In the District Court of the United States

[Title omitted]

Amendment to Answer of Defendant Interstate Commerce Commission—Filed January 31, 1941

Comes now the Interstate Commerce Commission and, leave of Court having been granted therefor, hereby amends its answer heretofore filed by adding at the bottom of page 3 of said answer the following:

"IV

"Further answering the complaint the Commission alleges and states that no one of the plaintiffs herein has any legal right or interest which is or would be affected, violated or of which a plaintiff would be deprived by the

order of the Interstate Commerce Commission complained of and hence neither the plaintiffs nor any one of them has any standing to institute or maintain this suit."

Interstate Commerce Commission, By Nelson Thomas, Attorney.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 38] In the District Court of the United States

[Title omitted]

Opinion—Rendered and Filed January 31, 1941

Before Simons, Circuit Judge, Moinet and Picard, District Judges.

Simons, Circuit Judge. The Petition seeks to enjoin and annul an order of the Interstate Commerce Commission granting to the defendant Fleming a certificate of public convenience and necessity under the so-called "Grandfather" clause of the Motor Carrier Act of 1935, Sec. 206a, 49 U. S. C. A. 306a (now Part II of the Interstate Commerce Act). The cause came on to be heard before a specially constituted District Court of three judges, convened in pursuance of Sec. 47, Title 28 U. S. C. A., and, as stipulated, the hearing was both preliminary and final upon the merits of the petition.

The plaintiffs are railroads engaged in interstate commerce, four of them having been interveners and protestants before the Commission. The defendants are Fleming, individually and under his assumed firm name, the Commission, and the United States. The order sought to be enjoined was entered on September 19, 1938, upon an application filed February 12, 1936, which was approved in part and in part denied, effective as of October 26, 1938. The Commission found that the applicant was engaged on June 1, 1935, and since that time, in bona fide operation as a common carrier by motor vehicle in drive-away service of new automotive vehicles, finished and unfinished, and new automotive vehicles chassis in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky,

North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, and over irregular routes through Idaho, Illinois, Indiana, Iowa, Kansas, Nevada, Nebraska, Ohio, [fol. 39] Oklahoma, Utah, Virginia, and Wyoming; that he was entitled to a certificate of public convenience and necessity authorized the continuance of this operation, and as incident thereto, to transport rejected vehicles or chassis from any point in the states to which service is authorized, back to Detroit.

It is stipulated that the plaintiff railroads are engaged in transporting automotive vehicles and chassis to points in the states named, and the plaintiffs base their right to contest the validity of the order upon this competitive situation, asserting that it gives them the status of parties in interest under the provisions of Sec. 205h of the Motor Carrier Act (now 205g of Part II), which recites, "any final order made under this Part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission under Part I * * *". They also justify their status as plaintiffs entitled to maintain the action by reason of the appearance of some as interveners in the proceeding before the Commission upon the authority of *Edward Hines, Trustee*, v. *U. S.*, 263 U. S., 132; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42.

The defendants deny that any of the plaintiffs are entitled to maintain this action, either by reason of their appearance in the proceeding before the Commission, or independently of that fact, and move to dismiss. Their motion must be overruled. The phrase "party in interest", as used in the Transportation Act, has been before the court upon numerous occasions, the latest discussion being that in *L. Singer & Sons, et al* v. *Union Pacific RR Co.*, —— U. S., ——, decided December 16, 1930. In that case, the plaintiff industry, and in its companion case, *Kansas City, Mo.* v. *L. Singer & Sons, et al.*, idem, the plaintiff municipality, were denied the right to contest an order of the Commission because such suits cannot be instituted by an individual unless he has some special and peculiar interest which may directly and materially be affected by alleged unlawful action. He must possess something more than a common concern for obedience to law. Absent such special and peculiar interest, he must, in common with the public interest, find his protection in the permission to sue

granted to public authorities. If, however, special circumstances are shown, then he is a party in interest within the meaning of the statute, the court giving approval to [fol. 40] the decision of this court to that effect in *Detroit & M. Ry.* v. *Boyne City,* 286 Fed., 540.

The complaining railroads and the defendant Fleming are equally engaged in the transportation of automotive vehicles from Detroit to the authorized destinations, and so within the rationale of the cases distinguished in the Singer decision, *Texas & Pacific RR Co.* v. *Gulf Colorado & Santa Fe RR. Co.,* 270 U. S. 266; *West Pacific California RR Co.* v. *Southern Pacific,* 284 U. S., 47, we conclude that they are possessed of that special and peculiar interest in the enforcement of the challenged order that gives to them the status of plaintiffs within the meaning of the statute. This being so, we need not inquire whether their right to maintain the action is also supported by the fact that some of them appeared as parties in the proceeding before the Commission.

Section 206a of the Motor Carrier Act, provides, except as elsewhere authorized, that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway • • • unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." The proviso in the Section referred to as the "Grandfather" clause, declares that if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made", and "has so operated since that time, except • • • as to interruptions of service over which the applicant had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation". Pending determination of the application the applicant is authorized to continue operations. Section 208a provides that the certificate issued under Sec. 206a shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate".

The plaintiffs assail the order of the Commission as not being supported by substantial evidence of actual operation in much of the territory granted, on the ground that Flem-

ing's deliveries were, in many of the states, negligible and [fol. 41] intermittent, so as not to qualify him for a certificate under the "Grandfather" clause. They also complain that the Commission misconstrued the statute by interpreting "territory" as synonymous with "state", and so exceeded its authority in granting rights for operation to all points in a number of the states when the proofs showed that deliveries had been made but to one or to several points of destination in such states. Finally, they challenge the finding that Fleming was in "bona fide" operation in all of the territory, on the ground that in a number of the authorized states he had not fully complied with state law governing the operation of motor carriers within or through such states.

The Commission found (MC 48654) that Fleming had commenced operations during the early part of 1933, from which time to July, 1936, he had transported or participated in the transportation of more than 2100 vehicles, the shipments consisting of from 1 to 16 vehicles, although shipments of 2 and 4 vehicles exceeded shipments of other quantities; that he had also transported used cars between various points in the states covered by his application, and had returned certain new cars, refused by the distributor or dealer, to Detroit, as a necessary incident to his business. In each of the states, save one, in which deliveries are authorized by the order, there had been shipments prior to the crucial date, June 1, 1935, and shipments thereafter prior to the date of the hearing. As to many of the states, the applicant had transported numerous shipments to the points served.

The statute is silent upon the degree of operation necessary to qualify the applicant for a certificate, under the "Grandfather" clause. Subject to the condition that the operation must be bona fide, hereinafter discussed, decision upon the substantial character of the applicant's business must be considered as having been committed to the judgment of the administrative agency entrusted by the Act with regulation and enforcement. The Commission found that Fleming was engaged in a highly specialized transportation service with few direct competitors, and that but 7% of all new automobiles sold in 24 western states were being transported by the method in which the applicant was engaged. In our application of the now familiar rules governing review of factual findings by administrative bodies, we are

unable to say that the findings of the Commission are un-
[fol. 42] supported by substantial evidence, and in this respect they will be sustained, except as to operation in the State of Arkansas. The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned. *U. S.* v. *Maher*, 307 U. S. 148.

As a basis for granting to Fleming authority to serve all points in a state, though actual operation during the critical period had been but to a limited number of distribution points in such state, the Commission relied upon evidence showing that distribution points are constantly being shifted from the standpoint of a state-wide area; that dealers accounts are frequently changed, and that sales volume at given points may show rapid increases or decreases. The result of a shift in distribution point would leave the applicant without authority to serve an account theretofore served, and render the carrier unable to continue an operation which he had been conducting. It took into consideration the nature and characteristics of this transportation service as highly specialized, the type of operation engaged in, the infrequency of the demands of consignees, and concluded that the record was convincing that the applicant's operations had been and would continue to be irregular in nature because of the conditions under which he might secure traffic, and that the same proof, with respect to territory served, that might be required of a general commodity hauler, could not be imposed upon him, nor could his operations be confined within the same definite limits.

The statute neither expressly nor by implication gives connotation to the phrase "within the territory". No standard is found whereby the area is to be delimited, and the plaintiffs had been unable to suggest criteria by which the Commission must be governed. It is general knowledge that in many industries distribution points are determined for areas coextensive with state boundaries. The Commission had made exhaustive studies of motor carrier transportation services and it must be assumed it has become expert in that field. We find no error in its findings in this respect.

The plaintiffs contend that Fleming's operations were not "bona fide" in character because he had failed to secure certificates from each of the states through or into which he conducted operations. Fleming had, however, [fol. 43] made inquiry as to certificate requirements, some of which were still pending at the time of the hearing. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas, were introduced, and the proofs showed that he held permits issued by the States of Oregon and Nebraska. In a few of the states, notably Missouri, there may have been temporary, inadvertent, or purely technical operation without sanction of local law. The Commission found, notwithstanding, that he had been engaged on June 1, 1935, and since, in bona fide operation within or through each of the states authorized.

This finding is attacked upon the authority of *McDonald* v. *Thompson*, 305 U. S., 263. While that case had not been decided when the findings of the Commission were made and its order entered, it was made the basis of a petition for rehearing before the Commission, which was denied. McDonald v. Thompson holds that the expression "in bona fide operation" suggests "absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire". It then reaches the conclusion that, "plainly the proviso does not extend to one operating as a common carrier on the public highways of the state in defiance of its laws".

In McDonald v. Thompson the Supreme Court was not called upon to set aside a finding of the Interstate Commerce Commission, that the applicant for a certificate of convenience and necessity had been in bona fide operation before and since the critical date, nor to determine whether the finding of the Commission had been based upon substantial evidence. That such finding is one of fact is indicated by the language of the court in *U. S.* v. *Maher*, supra, "Whether an applicant seeking exemption had, in fact, been in operation within the immunizing period of the statute, was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." Granted that the interpretation of the phrase "in

bona fide operation' 's a question of law, we find nothing in McDonald v. Thon pson to indicate that an applicant, who inadvertently or t mporarily made deliveries into or operated through a state without its express authority having previously been granted, is operating as a common [fol. 44] carrier on its public highways in defiance of its laws, when the state itself had not sought to exclude such carrier. McDonald had been refused the use of the highways of Texas by its Railroad Commission and its courts, but denied that Texas law applied, and set up as authority his application, under the Motor Carrier Act, and the provision therein that, pending acting upon the application, his operations might proceed. Fleming's operations were in recognition of state law, and his applications to state authority and his inquiries as to the requirements of the several states were obviously so considered by the Commission. In any event there is no evidence that his inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority.

The Commission had in mind the confusion that existed with respect to the requirements imposed by the laws of the various states, and the regulations of its public Commissions. It concluded, with reference to the Missouri situation, "compliance by applicant with the applicable laws of Missouri is a matter that rests between applic nt and the state authorities". Another consideration seems also important. Where Fleming had been operating with the express or implied consent of state officials while endeavoring to ascertain the formalities to be observed to secure a permit, the present denial of a certificate, by the Commission, to operate in such states under the "Grandfather" clause, would, if, thereafter, he satisfied state authority for necessary local authorization, be conclusive. As we read it, nothing in McDonald v. Thompson compels the conclusion that a finding by the Commission of bona fide operation must be set aside when such finding is based upon substantial evidence and there is no proof of the defiance of local law.

The order of the Commission will be modified by excluding from the certificate authorized thereby, authority to operate to the State of Arkansas, and as so modified the order of the Commission is sustained. The findings of the Commission and its conclusions of law, insofar as they

bear upon issues herein discussed, are adopted as the findings and conclusions of the court, except as modified.

Charles C. Simons, United States Circuit Judge.
Edward J. Moinet, United States District Judge.
Frank A. Picard, United States District Judge.

Jan. 31, 1941.

[fol. 45] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 1323

THE ALTON RAILROAD COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and JOHN P. FLEMING, an individual doing business as John P. Fleming Driveaway Service, Defendants

JUDGMENT AND DECREE—April 7, 1941

This cause came on to be heard before a specially constituted District Court of three judges, convened pursuant to Section 47, Title 28, U. S. C. A., on the 26th day of November, 1940, for both preliminary and final hearings; and upon due consideration thereof,

It is now ordered, adjudged and decreed:

1. The Report and Order of the Interstate Commerce Commission in John P. Fleming Common Carrier Application No. MC-48654, dated September 19, 1938, said Report being reported in 8 Motor Carrier Cases 469, is modified, and annulled in part, to the extent of excluding therefrom the authority therein granted to transport property from Detroit, Michigan, on the one hand, to any point in the State of Arkansas, on the other hand; and the defendant, John P. Fleming, is permanently enjoined from so operating under the authority of said Report and Order. In all other respects said Report and Order are sustained and the relief asked in plaintiffs' complaint is denied.

[fol. 46] 2. Costs are taxed to plaintiffs, except compensation of the court reporter and cost of furnishing

reporter's transcript, which costs have been paid by agreement of parties.

Plaintiffs and all defendants are duly allowed exceptions.

Done and ordered this 7th day of ~~March,~~ April, 1941.

Charles C. Simons, United States Circuit Judge.
Edward J. Moinet, United States District Judge.
Frank A. Picard, United States District Judge.

Approved as to form:

Amos M. Mathews, Attorney for all plaintiffs. Frank Coleman, Special Assistant to the Attorney General, attorney for defendant United States of America. Nelson Thomas, Attorney for defendant Interstate Commerce Commission. George S. Dixon, Attorney for defendant John P. Fleming, an individual doing business as John P. Fleming Driveaway Service.

[fol. 47] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFFS' ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed April 21, 1941

For their assignment of errors plaintiffs, appellants, say the District Court erred in entering its opinion, findings, and judgment and decree in this action, in the following respects:

1

In holding that there was sufficient evidence before the Interstate Commerce Commission to sustain its report and order, and its findings therein, that defendant, appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service;

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes

through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming;

[fol. 48] (b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

2

In holding that the Interstate Commerce Commission construed correctly the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act) including the following phrase in Section 206 (a), 49 U. S. C. A. 306 (a):

"• • • in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time • • •,"

and in holding that the Commission correctly decided in its construction of said Act that appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand;

[fol. 49] (b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

3

In sustaining the conclusion of the Interstate Commerce Commission that because (8 M. C. C. p. 472):

"Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in * * * Alabama; shipments to two points in each of the States of California * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia,"

the said defendant, appellee, John P. Fleming, was on June 1, 1935, in bona fide operation as a common carrier by motor vehicle from Detroit, Michigan, to all points in said states.

4

In sustaining the findings and conclusions of the Interstate Commerce Commission that transportation by the said [fol. 50] defendant, appellee, John P. Fleming, of the few automotive vehicles shown by the evidence to have been transported by him, on a few occasions to a few points in Washington, Oregon, California, and Texas, constituted bona fide operation as a common carrier by motor vehicle either on or after June 1, 1935, to any points in said states.

5

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was operating only as a contract carrier by motor vehicle on June 1, 1935, in Oregon, and has so operated there since that time, and therefore was not then and there operating as a common carrier by motor vehicle.

6

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was not in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and since that time, in, or upon the highways of Oregon, Nebraska, Missouri, Texas, and Ohio, because he was during such time operating upon the public highways of such states in vio-

lation of their laws regulating and taxing the operations of motor vehicles upon such highways.

7

In failing to hold that if said appellee, Fleming, was in operation on June 1, 1935, and since that time, in any territory within which is included, either as the whole or a part [fol. 51] thereof, Oregon, Texas, Nebraska, Missouri, or Ohio, said appellee was not in bona fide operation within said territory because he was operating in violation of the laws of said states.

8

In adopting as its own, except to the extent modified in the opinion and decree, the findings of fact of the Interstate Commerce Commission.

9

In adopting as its own, except to the extent modified in the opinion and decree, the conclusions of law of the Interstate Commerce Commission.

10

Insofar as it held that the question, whether violation of state laws by a motor carrier constitutes lack of bona fide operation, is a question of fact for the determination of the Interstate Commerce Commission.

11

In holding, either as a finding of fact or as a conclusion of law, or both, that any violations of state laws by appellee Fleming were temporary, inadvertent, or technical; and in failing to hold that such violations were intentional.

12

In finding that four of the plaintiffs were interveners and protestants before the Interstate Commerce Commis- [fols. 52-55] sion, whereas the undisputed evidence shows that *all except four* of the plaintiffs were interveners and protestants before the Commission. (It is believed that the Court's statement and finding here excepted to is an inadvertence.)

Wherefore, plaintiffs, appellants, pray that as much of the final decree of the District Court as denies any relief asked by plaintiffs be reversed, and that the plaintiffs have all of the relief prayed in their complaint.

Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs, Appellants.

[fol. 56] In United States District Court

[Title omitted]

Plaintiffs' Petition for Allowance of Appeal—Filed April 21, 1941

To the Honorable Charles C. Simons, United States Circuit Judge; The Honorable Edward J. Moinet, United States District Judge; and The Honorable Frank A. Picard, United States District Judge:

The above named plaintiffs, being all of the plaintiffs in this cause, respectfully state:

Believing the final decree of the Court, and the opinion, findings and conclusions of the Court upon which said decree is based, to be erroneous, except insofar as said decree grants a part of the relief asked by plaintiffs, the plaintiffs pray for the allowance of an appeal from said final decree, insofar as said decree denies any relief asked by plaintiffs, to the Supreme Court of the United States.

The errors upon which plaintiffs claim to be entitled to an appeal are more fully set out in the Assignment of Errors and Prayer for Reversal filed in the office of the Clerk of this Court and presented herewith.

Plaintiffs have also filed in the Clerk's office, and present herewith, a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the Supreme Court.

Respectfully submitted, Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs, Appellants.

[fol. 57] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING PLAINTIFFS' APPEAL—April 21, 1941

The plaintiffs having presented to the Court their petition for appeal to the Supreme Court of the United States from the final decree of the Court, said petition being accompanied by an Assignment of Errors and a Statement as to Jurisdiction of the Supreme court, and said papers and the record herein having been considered,

It Is Now Ordered By the Court:

The plaintiffs are allowed an appeal to the Supreme Court of the United States from as much of the final decree of this Court as denies any relief asked by plaintiffs.

Plaintiffs shall file security for costs in the penal sum of $250.00.

Done and ordered this 21st day of April, 1941.

Charles C. Simons, United States Circuit Judge. Edward J. Moinet, United States District Judge. Frank A. Picard, United States District Judge.

[fols. 58-59] Citation in usual form showing service on the United States of America, Interstate Commerce Commission and John P. Fleming, omitted in printing.

[fols. 60-61] Cost Bond on appeal for $250 approved and filed April 21, 1941. Omitted in printing.

[fol. 62] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Statement of the Evidence—Filed April 28, 1941

This cause came on for hearing on the 26th day of November, 1940, at Detroit, Michigan, before the Hon. Charles C. Simons, United States Circuit Judge, and the Hon. Edward J. Moinet and Frank A. Picard, United States

District Judges, sitting as a three-judge court pursuant to Section 47, Title 28, U. S. C. A.

Appearing for the plaintiffs were Amos M. Mathews, Henry P. Stacy, and Frederick V. Slocum; for the defendant, United States of America, Frank Coleman, Special Assistant to the Attorney General; for the defendant, Interstate Commerce Commission Nelson Thomas; for the defendant, John P. Fleming, an individual doing business as John P. Fleming Driveaway Service, Carney D. Matheson and George S. Dixon.

Stipulation

It was stipulated that the hearing should be both a preliminary and a final hearing of the cause.

Amendments to Pleadings

The amendment to the answer of defendant, Interstate Commerce Commission, was allowed and ordered filed. Plaintiffs, with leave of Court, amended their complaint by striking therefrom paragraph 10 and sub-paragraph (h) of paragraph 8.

[fol. 63] Plaintiffs' Evidence

Plaintiffs' exhibits numbered, respectively, 1, 2, 3, 4, and 5, were received in evidence. Exhibits 1, 2, 3, and 4, comprise a transcript, certified by the Secretary of the Interstate Commerce Commission, and under the Commission's seal, of the entire record of the proceedings before the Commission described in plaintiffs' Complaint. Exhibit No. 5 is a stipulation in writing, agreed to and signed by all parties.

The aforesaid five exhibits constitute all of the evidence offered or received at the trial before the District Court. The following is a true abstract of all of the material parts of said exhibits, prepared pursuant to the provisions of paragraph 2 of Rule 8, and paragraph 2 of Rule 10 of the Rules of the Supreme Court. Wherever in the following the words "District Court (or D. C.) exhibits" or "plaintiffs' exhibits" appear, they refer to exhibits introduced by plaintiffs at the hearing in the District Court. Wherever in the following the words "applicant's exhibits" appear,

they refer to exhibits introduced at the hearing before the Interstate Commerce Commission examiner by the applicant there, John P. Fleming, etc.

[fol. 64] PLAINTIFF'S EXHIBIT NO. 1

Form B. M. C. 1.

PROPERTY CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form for use only by Common Carriers engaged in transportation of property in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter.)

(Before answering, read General Instructions on last page. Numbers under line refer to Special Instructions on that page.)

Before the Interstate Commerce Commission

Docket No. 48654

Application of John P. Fleming Driveaway Service (Full and correct name) for a Certificate (Certificate or permit) to operate as a common carrier (limited) (Common carrier or contract carrier) of property, under the Motor Carrier Act, 1935.

Application

To the Interstate Commerce Commission, Washington, D. C.

Applicant States:

That full and correct name of applicant is John P. Fleming Driveaway Service.

Business address 12801 Kercheval Avenue, (Street and number), Detroit (City), Wayne (County), Michigan (State).

That applicant is an individual, doing business under

(1)

the trade name or style of John P. Fleming Driveaway Service.

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on June 1, 1935, were as shown in Exhibit A, and that no (2)
change has occurred therein since that date, except as shown in that exhibit.

[fol. 65] That applicant submits as evidence in support of statements contained in Exhibit A, the information contained in Exhibit B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in Exhibit C.

Wherefore, The applicant herein prays: That the Commission issue a Certificate (Certificate or permit) to operate as a common carrier (limited) (Common or Contract Carrier) of automobiles, trucks, chasses, unfinished automobiles and all (State whether commodities generally, with certain exceptions, or special commodities only) other automotive vehicles only, and applicant further prays that if the facts herein contained show that applicant, although applying for a certificate (Certificate) (Permit) is entitled to a permit (Permit) (Certificate), this application be considered to be one for the appropriate form of authority.

Dated this 5 day of February, 1936.

John P. Fleming Driveaway Service, (Applicant),
(Signed) By John P. Fleming (Title) Owner.

Oath

STATE OF MICHIGAN,
County of Wayne, ss:

John P. Fleming (Name of affiant) makes oath and says that he is the owner (Title of affiant) of the John P. Fleming Driveaway Service; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits at-
[fol. 66] tached thereto and made a part thereof; that he has knowiedge of the matters set forth therein and that all

such statements and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

(Signed) John P. Fleming.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 5 day of February, 1936. (Signed) George S. Dixon. (Seal.)

EXHIBIT A

John P. Fleming Driveaway Service
(Name of Applicant)

Except as otherwise noted, the following information is to be as of June 1, 1935, if application is for a Certificate; and as of July 1, 1935, if application is for a Permit. However, this instruction is not intended to confine all answers of applicant strictly to such dates. The information given should, where necessary, cover a sufficient period prior to such dates to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the Certificate or Permit sought under the "Grandfather" clause.

Type of Service and Routes and Territory Served

I. Type of service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce, property, consisting of (1) ~~commodities generally except, (Indicate exceptions, either specifically or by their general nature)~~ or

(2) special commodities See statement No. 1, Exhibit "A" (Indicate class or classes of commodities transported) (Strike out (1) or (2), whichever is inapplicable to applicant's business).

[fol. 67] B. Applicant (or predecessor) undertook to transport property for the general public for hire Yes. (Yes)

C. Applicant has continued to operate as above stated without any change in the type or extent of service and is now so operating Yes (Yes) (No). If the answer is "No", state in detail character and extent of such changes.

D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons clearly and in detail. See statement No. 2, Exhibit "A".

II. Description of each route regularly operated on June 1, 1935:

(2)

See statement No. 3, Exhibit "A".

A. By applicant (or predecessor in interest) in own right:

Show also, for each route separately:

(1) Whether all intermediate points were served Yes (Yes) (No); if not, indicate exceptions:

(2) The off-route points served off-route points from all principal highways served. See statement No. 3, Exhibit
(4)
"A".

(3) Character of traffic (that is, commodities generally, with certain exceptions; special commodities, etc.) Automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles Only. (Specify exceptions, or special commodities).

(4) Frequency of service (where interval between schedules was more than a day) irregular

(5) Points at which traffic was interchanged, with whom interchanged, and the arrangement under which interchange was effected, including whether or not through rates were used No interchange of traffic.

[fol. 68] B. Has applicant acquired or instituted a route or routes since —— 1, 1935? (Yes) (No) If so, attach
(2)
statement designated as II-B), giving, for each such route, the information required in (A) above and named and address of predecessor, if any. Attach copy of purchase

agreement, State certificate or permit, or other documents evidencing acquisition or institution of each such route or routes. See statement No. 4, Exhibit "A".

C. Does applicant herein apply for rights over any route or routes operated by others under agreement? (Yes) (No) If so, attach statement (designated as II-C), giving, for each such route, the information requested in (A) above and name and address of operator. Attach copy of lease or operating agreement. See statement No. 4, Exhibit "A"

D. Does applicant operate over any route or routes under a lease or operating agreement? (Yes) (No) If so, attach statement (designated as II-D), giving, for each such route, the information requested in (A) above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement. See statement No. 4.

E. Has applicant abandoned or otherwise disposed of any route or routes since —— 1, 1935? (Yes) (No) If so,
(2)
attach statement (designated as II-E), giving, for each such route, the information requested in (A) above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal. See statement No. 4, Exhibit "A".

[fol. 69] F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? (Yes) (No) If so, give the date on which operations commenced. See statement No. 4, Exhibit "A".

G. Were operations on any of the above routes or parts of routes seasonal? (Yes) (No) If so, attach statement (designated as II-G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating season. See statement No. 5, Exhibit "A".

III. Description of operations over irregular routes on
(2)
—— 1, 1935: See statement No. 6, Exhibit "A".

A. Location of applicant's headquarters 12801 Kercheval Avenue, Detroit, Michigan.

B. Where did applicant obtain the main volume of its traffic? If a place or places, name them; if a territory, describe it fully. See statement No. 7, Exhibit "A".

C. To what principal place, places or territory did applicant transport such traffic? Answer as in (B). See statement No. 8, Exhibit "A".

D. If answers to the above questions do not adequately and completely describe applicant's operations on —— 1, 1935, describe operations clearly and in detail. See statement No. 8, Exhibit "A".

E. Have there been any changes in the nature or extent of applicant's irregular route operation between —— 1, 1935, and date of this application? (Yes) (No) If so, describe the changes in detail. See statement No. 9, Exhibit "A".

IV. A. Number of vehicles in revenue service on June 1, (2)
1935: See statement No. 10, Exhibit "A".

[fol. 70] EXHIBIT "A"

Statement No. 1

I-A. (a) Special Commodities, automobiles, trucks, chasses, unfinished trucks, chasses, unfinished automobiles and all other automotive vehicles.

Applicant has, for a number of years, been engaged in the business of "Driveaway", transporting the above mentioned commodities from points of origin to any and all points within the United States.

Applicant has also been serving large fleet purchasers who may purchase a chassis in one state and have applicant drive the chassis to another state at which point a special body may be mounted and thence to point of delivery. This latter operation may include more than one point of origin of the commodity from almost any point within the United States to any and all points in the United States.

Certificates or permits by various state public utilities commissions not being required for this type of operation, applicant has been serving the public in general as a com-

mon carrier limited to the transportation of the above commodities over irregular routes from any point or origin to any and all cities, towns and municipalities in the territory served.

The term "Driveaway" commonly applied to the business of driveaway more specifically includes:

(1) Driveaway (individual driving of each vehicle under its own power.)

(2) Towaway (driving one vehicle under its own power and towing or pulling another vehicle behind by means of a towbar attachment.)

(3) Bolster Mount and Full Mount (driving one vehicle under its own power upon which is mounted partially (front wheels) or wholly other vehicle or vehicles or combination of both.)

[fol. 71] The principal characteristic of the driveaway business is that automobiles, trucks, etc. are driven under their own power to any point or points requested by any manufacturer, dealer, firm or individual purchaser. The frequency or volume of such delivery is based upon the sales of said motor vehicles and may vary from point to point in different states depending upon the volume of sales. The operation necessarily is characteristically irregular because applicant holds itself out to serve every city, town, village or cross-road in the United States.

From the very nature of the service rendered by applicant to the public, *applicant believes that it should be classified under the Federal Motor Carrier Act as a common carrier limited to the transportation of the above commodities over irregular routes from points of origin to any and all points in the United States.*

Statement No. 2

I-D. The only interruption of service, if it can be called such, is a very substantial curtailment of operations for a short time the latter part of each year at which time the automobile industry is engaged in the changing of models. The driving of automobiles and trucks during this period is reduced to a low minimum until such time as the manufacturing of new vehicles is resumed and motor vehicles are ready for distribution.

[fol. 72] *Statement No. 3*

II. A complete description of routes regularly operated on June 1, 1935 would necessarily involve the naming of every main United States highway as well as every highway in each state in the territory served by applicant in its driveaway operation, if the use of any of the highways in its operation, can be called operating over regular routes. The driveaway operation as mentioned heretofore has never required certificates of Public Convenience and Necessity by various states in or through which the automobiles were driven under their own power. Such automobiles, trucks and other automotive vehicles were delivered to all points in the territory served by this applicant upon request. From the very nature of the business, the operation is very irregular.

The use of highways in driving automobiles between larger towns is much more frequent than to smaller towns or off-route points. Only such use of the highways could possibly be called regular routes but even such classification, applicant believes, would be illogical and impossible to set out in detail the entire territory served by applicant as shown in the exhibits attached hereto and made a part hereof. Classifications based upon the frequency and use of the highway would not only be illogical but very indefinite. In addition, the frequency of service, unlike that of a common carrier of freight, is subject to constant change depending entirely upon one industry and primarily upon the sales and distribution of automobiles, trucks and all other automotive vehicles.

Applicant believes, therefore, that subject to the conditions mentioned heretofore, it did not operate over regular routes but held itself out as a driveaway operator on June 1, 1935, serving all the states in the specified territory as a common carrier limited to the transportation of automo-
[fol. 73] biles, trucks, chasses, unfinished automobiles and all other automotive vehicles by means of driveaway over irregular routes and as proof of such operation attaches shipping bills as shown in Exhibit "B" Statement No. 2, specific reference to which is hereby made, showing actual operations in the following territory:

States of: *Passing Through But No- Serving the States of* Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wy-

oming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia. *Serving the States of* Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, *Arkansas, Texas, Washington, Oregon* and *California.*

Applicant believes that it is entitled to a certificate as a common carrier limited to the transportation of automobiles, trucks and all other automotive vehicles operating over irregular routes serving all the states above listed.

Statement No. 4

II-B-C-D-E-F

The matter of routes, acquisition or sale of routes is not involved in applicant's operation of its driveaway business. Applicant operates irregularly over all highways in the territory served. There were no requirements by states for certificates or permits setting forth any routes, regular or irregular for driving of cars under their own power. This type of business to the present time has been unregulated but applicant believes that this type of operation as defined in Statement No. 1 does come within the provisions of the Federal Motor Carrier Act and makes this application in conformity therewith.

[fol. 74] *Statement No. 5*

II-G. As explained in Statement No. 2 of Exhibit "A", there is a very substantial curtailment and in some instances operations cease for a period of approximately two months at the end of each year at which time the automotive industry is engaged in the changing of models. Such seasonal operations if it can be called such depends upon the policy of the various manufacturers in changing models. The period of such change may be moved from one period of the year to another. The transportation of the commodities mentioned in this application by applicant is, therefore, subject to the seasonal changes of the automotive industry.

Statement No. 6

III. As referred to in previous statements, the entire operation as covered under this application was operated over irregular routes on June 1, 1935 in the following territory:

States of: *Passing Through But Not Serving the States of:* Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wyoming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia.

Serving the States of: Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Arkansas, Texas, Washington, Oregon and California.

The very nature of applicant's business, namely the driving of automobiles, trucks and all other automotive vehicles to any city, town, village, or cross-road within the territory mentioned heretofore in which a sale is made or automobiles ordered by dealers or manufacturers makes it necessary to transport such commodities and maintain the service of a common carrier limited to the transportation of the commodities mentioned heretofore.

Therefore, applicant believes that it is entitled to a certificate as a common carrier limited to the transportation of automobiles, trucks, etc. over irregular routes serving all the states above listed.

[fol. 75] *Statement No. 7*

III—B. Applicant's principal traffic originates in all the automobile manufacturing points in the territory in or through which it operates and where automobiles, trucks, bodies, cabs, chasses, unfinished automobiles and all other automotive vehicles are manufactured, either at main plants, assembly plants, specialty plants or otherwise. Even this traffic is subject to constant change following any and all changes of plant location of the automotive and its allied industries.

Applicant also receives traffic to and from any and all transfer points, boat docks or from any company, individual or individuals requesting its service to all points in the territory it serves.

There is also an additional volume of traffic originating in various states from back hauls or cross movements and

from small specialty plants which are engaged in special or partial assembly of motor vehicles and parts thereof. A typical example of such a movement is as follows: A chassis might be purchased from one manufacturer and applicant may transport it to a specialty shop for a particular kind of brakes. From this point it is transported to another manufacturer in another state for installation of a special type of body and from there to another manufacturer in still another state for the installation of other special equipment. Then from this point of origin it may be transported back to the original point of origin from which place it may again be delivered to any designated point as requested by the purchasers. Such a procedure might take days or weeks and applicant may be transporting the same commodity from any number of points of origin any number of times. This is a typical example why the point of origin of the above mentioned commodities cannot be fixed to definite places within the territory served.

[fol. 76] Applicant's business necessarily depends upon the automobile and its allied industries and the point of origin of such traffic cannot be fixed to any definite point or number of points but necessarily follows the developments of the automotive industry and its allied industries as a whole in the territory served and as shown in the attached exhibits.

Statement No. 8

III—C. As explained in previous exhibits and statements, due to the peculiar nature of the commodities hauled, deliveries are made to every point or points within the territory served by applicant. The movement of the commodities transported by applicant originates from the points mentioned in Exhibit "A", Statement No. 7, III—B and deliveries are made over irregular routes to all cities, towns, villages or cross-roads within the territory mentioned heretofore in which a sale is made of automobiles ordered by dealers or manufacturers. Even such deliveries are subject to constant change to the various policies of the different manufacturers.

The irregular movement mentioned is one of the peculiarities of this type of hauling and one of the principal reasons justifying the request of applicant for the creation of a special class under the general common carrier class in

pursuance to the provisions of Sub-Section C of Section 204 of the Federal Motor Carrier Act.

[fol. 77] *Statement No. 9*

III—E. The nature of applicant's irregular operation and the change necessary due to business fluctuations, etc. have already been fully explained in previous statements, particularly Statements No. 1, No. 3 and No. 8 under Exhibit "A".

Statement No. 10

IV. No vehicles were used in the transportation of the commodities mentioned in this application.

Automobiles and trucks were driven under their own power in such manner as described heretofore.

[fol. 78] EXHIBIT B

John P. Fleming Driveaway Service

(Name of applicant)

Evidence of Operation

I. Applicant as a common carrier on June 1, 1935, or a contract carrier on July 1, 1935, submits the following evidence as proof of his operations:

A. Certified copy of any order of any State authorizing applicant's or predecessor's operations and of any order authorizing transfer of such authority to applicant. (Attach and identify as statement B-I-A.) See Statement No. 1, Exhibit "B".

B. That applicant or a predecessor was registered under a Code of Fair Competition as follows:

Registrant (If predecessor, give name): John P. Fleming Driveaway Service.

Name of Code: Trucking Code.

Date or dates of registration: 12-31-34.

C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, port of entry

receipts, etc. (Attach and identify as statement B-I-C.) See Statement No. 2, Exhibit "B".

Statement No. 1

I—A. Applicant was not required to obtain any orders or certificates from any state in order to conduct its driveaway operations as defined heretofore.

Proof of its driveaway operations will be given under Exhibit "B", Statement No. 2.

[fol. 79] *Statement No. 2*

STATE OF MICHIGAN,
County of Wayne, ss.:

John P. Fleming of the city of Detroit, being first duly sworn deposes and says that he is owner of John P. Fleming Driveaway Service which company is making the attached application for a certificate under the Grandfather Clause of the Federal Motor Carrier Act and that he makes this affidavit for and on behalf of the company to substantiate and prove its operations in the states of:

Alabama, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, South Carolina, Texas, Utah, Wyoming, Virginia, and Washington, which states did not have regulatory laws requiring the issuance of certificates or permits to interstate operators operating in and through said states.

Deponent further says that in order to meet the requirements of the application and particularly Exhibit "B" he is also attaching to this affidavit primary evidence to support and substantiate the allegations in this affidavit, namely, original copies of shipping bills for the attached hereto and made a part hereof.

Deponent further says that the shipping bills, etc. were picked at random to cover the period mentioned heretofore and only in such numbers as to show its bona fide operation in and to such territory, as required under the Federal Motor Carrier Act and deponent will, at any time, produce [fol. 80] upon the request of the Interstate Commerce Commission additional shipping bills, affidavits and other primary evidence and that the attached exhibits were re-

duced to such a number as not to make this application unreasonably bulky.

Further deponent says not.

(Signed) John P. Fleming, Deponent.

Subscribed and sworn to before me this 5 day of February, A.D. 1936. (Signed) George S. Dixon, Notary Public, Wayne County, Mich. (Seal.)

[fol. 81] PROTEST BY RAILROAD COMMISSION OF TEXAS

Before the Interstate Commerce Commission Motor Carrier Bureau Division Number 5

Application of: John P. Fleming Drive-way Service, 12801 Kercheval Avenue, Detroit, Michigan

Application for a common carrier certificate under Subdivision 'A' of Section 206, Federal Motor Carrier Act 1935

Protest by the Railroad Commission of Texas Against the issuance of either a common carrier certificate under Subdivision 'A' of Section 206, or a contract carrier permit under Subdivision 'A' of Section 209 (Grandfather Clause) Federal Motor Carrier Act 1935, to the applicant.

Texas Commission Protest No. 303

February 21, 1936.

I. C. C. Docket No. —

To the Interstate Commerce Commission Motor Carrier Bureau Division No. 5:

Now comes the Railroad Commission of Texas, the duly elected and qualified Commission, charged by law with the duty and responsibility of administering the provisions of Article 911-b, (Texas Motor Carrier Act) Revised Texas Statutes 1925, and files this protest against the granting of either a common carrier certificate or a contract carrier permit under either of the 'Grandfather Clauses' of the Federal Motor Carrier Act 1935 to applicant and in support thereof informs the Interstate Commerce Commission, Motor Carrier Bureau Division Number 5, that:

I

The Texas Motor Carrier Act, Article 911-b, Revised Texas Statutes 1925, became effective August 21, 1931,

as an amendment to the former Motor Carrier Act and thereby repealing said former Act. Since the effective date of the present Texas Motor Carrier Act, the Commission has conceived it to be its duty by reason of the various terms and provisions of said Act to require all motor carriers for hire, as therein defined, whether transporting [fol. 82] intrastate or interstate commerce, to procure from it either a certificate authorizing a common carrier motor carrier service, a contract carrier permit authorizing a contract carrier service or a special commodity permit authorizing the transportation of the special commodities named in Subdivision 'D' of Section 6, of said Act. The Texas Commission has, so far as intrastate applications were concerned, granted or denied same upon considerations of adequacy of the facilities of existing transportation facilities, the effect the proposed motor carrier operation would have upon the existing facilities if adequate and upon consideration of whether or not the proposed operation would result in injury or damage to the highways and whether or not such proposed operation would unreasonably interfere with the public's use of said highways for general purposes; and as to interstate applications, the Texas Commission has determined whether or not it would grant same upon considerations only of whether or not the proposed operation would do injury or damage to the highways and whether or not the proposed operation would unreasonably interfere with the public's use of said highways for general purposes. In determining whether or not it would grant an operation proposed by an applicant to transport the special commodities named in Subdivision 'D' of Section 6, of said Texas Motor Carrier Act, the Texas Commission has taken into consideration only the highway conditions and the probable interference which the proposed operation would cause the general public's ordinary use of the highways involved.

II

As to actual operations of the applicant, the protestant alleges upon information and belief, based upon reports of its employees required by law to make investigations of motor carrier operations, that the applicant has not [fol. 83] during the year 1935, nor upon the dates of either June 1 or July 1, 1935 operated over the highways of the state of Texas in the transportation of property for hire

to such an extent or in such manner as to support a claim that such operations were conducted in good faith.

III

The applicant was not on June 1, or July 1, 1935, the holder and owner of any permit or certificate issued by the Railroad Commission of Texas.

IV

Any operation conducted over the highways within the State of Texas by the applicant either as a contract carrier, as a common carrier or as a special commodity carrier on, prior to or subsequent to either June 1, or July 1, 1935, or any time during the year 1935, were unlawful and, therefore, not bona fide operations for the following reasons, to-wit:

(a). It is unlawful for any motor carrier, either interstate or intrastate, to transport property for hire over the highways of the State of Texas without having first obtained from the Railroad Commission of Texas either a permit authorizing a contract carrier service or a special commodity carrier service or a certificate authorizing a common carrier service. (Article 911-b Revised Texas Statutes 1925).

(b). The applicant may not claim that he is the successor in ownership of any contract carrier motor carrier permit or special commodity carrier motor carrier permit issued by the Railroad Commission of Texas for the reason that Article 911-b Revised Statutes of Texas 1925 (present [fol. 84] Texas Motor Carrier Act) does not authorize the lease, sale, inheritence or in any other manner the transfer of such permits.

Wherefore, The Railroad Commission of Texas respectfully requests that the Interstate Commerce Commission refuse the application of the applicant; or, in the alternative, set said application for hearing and grant this protestant the opportunity to submit proof of facts herein alleged.

(Signed) Ernest O. Thompson, Ch[illegible]rman Railroad Commission of Texas

[fol. 85] PROTEST BY THE PUBLIC SERVICE COMMISSION OF MISSOURI

Before the Interstate Commerce Commission

John P. Fleming Driveaway Service Detroit, Michigan Applicant for a Certificate under the "Grandfather" Clause, Section 206, Motor Carrier Act, 1935.

Objections to Granting of Certificate

Comes now the Public Service Commission of Missouri, and objects to the granting of said certificate, and as reason therefor, states:

That the Public Service Commission of Missouri is vested with power and authority, and it is the duty of the Commission to license, supervise and regulate every motor carrier operating for hire over the public highways of the State of Missouri; to promulgate and approve rules and regulations governing the operation thereof; after the filing of a petition and a hearing thereon, to issue or reject interstate permits; to assess and collect fees and taxes from those so engaged within the State of Missouri.

The above-named applicant states that he operated or held himself out as a bona fide common carrier on June 1, 1935, within the State of Missouri. The records of the Public Service Commission of Missouri show that neither the applicant, nor predecessor in interest, if any, has been issued a permit to so operate as a common carrier within the State and has not paid the fees and taxes so provided, and any operation as a common carrier conducted by the said applicant, or predecessor in interest, if any, has been in violation of the Missouri statutes.

[fol. 86] Therefore, insofar as it pertains to operation within the State of Missouri, as said applicant was not a bona fide operator within this State on June 1, 1935, objection is made to the granting of the certificate for which application was made by the above applicant.

Public Service Commission of Missouri, Robert E. Holliway, Secretary. (Seal.)

Dated at Jefferson City, Missouri, this 21st day of May, 1936.

[fol. 87] PROTEST BY THE PUBLIC UTILITIES COMMISSION OF OHIO

Before the Interstate Commerce Commission

JOHN P. FLEMING, dba John P. Fleming Driveaway Service, 128 Kercheval Avenue, Detroit, Michigan

Applicant for certificate or permit under "Grandfather" Clause, Section 206, Motor Carrier Act, 1935.

OBJECTIONS TO GRANTING OF CERTIFICATE OR PERMIT

Comes now The Public Utilities Commission of the State of Ohio and objects to the granting of said certificate or permit and, as reasons therefor, states:

That the objector is the duly appointed, qualified and acting Public Utilities Commission of the State of Ohio and, as such, is vested with the power to grant or revoke a certificate or permit to those engaged in public transportation by motor vehicle or truck, together with the supervision of those operating under certificate or permit, and the duty to collect taxes and fees from those so engaged; and that such certificate or permit is a condition precedent to legal operation within the State of Ohio.

The records of the Commission show that neither the applicant nor any predecessor in interest, held a certificate or a permit to operate as a common carrier or as a contract carrier within the State of Ohio on July 1, 1935. In the event either was so operating within this state at that time, such operation was in violation of the law and not a bona fide operation within the meaning of the Motor Carrier Act, 1935.

Objection, therefore, is made to the granting of any [fol. 88] rights to operate in interstate commerce over the highways of the State of Ohio by the said applicant as it had not complied with the laws of Ohio relative to such operation on or before July 1, 1935.

(Sgd.) E. J. Hopple, Chairman. Charles F. Schaber, R. D. Williams, Commissioners.

Dated at Columbus, Ohio, this 14th day of April, 1936.

[fol. 89] PETITION OF INTERVENTION BY WESTERN COMMON CARRIERS

Before the Interstate Commerce Commission

Application of John P. Fleming Driveaway Service for a certificate to operate as a common carrier by motor vehicle in the transportation of automobiles, trucks, chassis, unfinished automobiles and all other automotive vehicles.

Docket B. M. C. 48654

Petition of Intervention

Come now your petitioners, common carriers by railroad operating in the western district of the United States, as indicated in Appendix A, attached hereto and made a part hereof, and respectfully represent that they have an interest in the matters involved in the above entitled proceeding now set for hearing before Examiner A. E. Later on July 23, 1936, at Detroit, Michigan, and desire to intervene and protest in and become parties to said proceeding, and for grounds for the proposed intervention and protest say:

I

That petitioners are corporations engaged as common carriers by railroad in the transportation of property, including vehicles of all kinds, in the western district of the United States.

II

That the applicant, John P. Fleming Driveaway Service, in the above entitled proceeding seeks authority and a certificate as a common carrier for the transportation of automobiles, trucks, chassis, unfinished automobiles and all automotive vehicles passing through but not serving points [fol. 90] in the states of Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wyoming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia, and serving points in the states of Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Arkansas, Texas, Washington, Oregon and California, and in so doing seeks

authority to transport such property in direct competition with each and all of your petitioners; that the above entitled proceeding will involve the interpretation of the Motor Carrier Act, 1935, and its application to operations which have been or may hereafter be conducted by applicant, and which are in direct competition with your petitioners; and that your petitioners are informed and believe, and, therefore, state on information and belief, that applicant seeks a certificate to conduct operations not authorized by law, and that applicant was not on June 1, 1935, engaged in bona fide operations as a common carrier by motor vehicle in the transportation of the commodities in the area and in a manner which should legally authorize the issuance of the certificate sought; and, therefore, your said petitioners will be vitally and directly affected by the issuance of the certificate prayed by the applicant and by the interpretation of said Motor Carrier Act, 1935, by the Interstate Commerce Commission; your petitioners, therefore, believe it in their interest and in the public interest that they be permitted to become parties to this proceeding in order that they may participate therein, present their views by oral or written argument, enter their protest against the granting of the certificate as prayed by the applicant and be of such assistance as they can to the Commission in determining the facts in such proceeding and the proper interpretation of the Motor Carrier Act, 1935, as to the questions involved.

[fol. 91] Wherefore, said petitioners pray leave to intervene and be treated as parties in this proceeding, and to protest against the issuance of a certificate as prayed by the applicant, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Respectfully submitted, Joseph H. Hays, Attorney for Petitioners, 474 Union Station Building, Chicago, Illinois.

July 23, 1936.

Appendix A

The Alton Railroad Company.

Atchison, Topeka and Santa Fe Railway.

Chicago and Eastern Illinois Railway Company (Charles M. Thomson, Trustee).

Chicago & North Western Railway.

Chicago, Burlington and Quincy Railroad Co.

Chicago Great Western Railroad (Patrick H. Joyce and Luther M. Walter, Trustees).

Chicago, Milwaukee, St. Paul and Pacific R. R. (Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees).

The Chicago, Rock Island & Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees).

The Denver & Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees).

The Denver & Salt Lake Railway Company.

Duluth, Winnipeg & Pacific Railway.

Fort Smith and Western Railway (L. B. Barry, Jr., Receiver).

[fol. 92] Great Northern Railway.

Illinois Central Railroad Company.

Illinois Terminal Railroad System.

The Kansas City Southern Railway Company.

Litchfield and Madison Railway Company.

Louisiana & Arkansas Railway Company.

Midland Valley Railroad Company.

The Minneapolis & St. Louis Railroad Co. (L. C. Sprague and John Junell, Co-Receivers).

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Missouri and Arkansas Railway Company.

Missouri-Kansas-Texas Railroad Co.

Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).

Northern Pacific Ry.

St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees).

St. Louis Southwestern Railway Lines (Berryman Henwood, Trustee).

Southern Pacific Company.

The Texas and Pacific Ry. Co.

Union Pacific Railroad.

Wabash Railway Company (Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers).

The Western Pacific Railroad Company.

[fol. 93] PROTEST OF SOUTHERN RAIL CARRIERS

BEFORE THE INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

B. M. C. Docket No. 48654

In re: APPLICATION OF JOHN P. FLEMING (JOHN P. FLEMING DRIVEAWAY SERVICE) FOR CERTIFICATE UNDER THE "GRANDFATHER" CLAUSE OF THE MOTOR CARRIER ACT, 1935

Whereas the protestants listed in the Appendix, attached to and made a part hereof, are informed that John P. Fleming (John P. Fleming Driveaway Service), hereinafter referred to as the applicant, whose principal place of business is stated in the application as being in the City of Detroit, State of Michigan, has applied to the Interstate Commerce Commission for a certificate as a common carrier of property under the "grandfather" clause of section 206(a) of the Motor Carrier Act, 1935, to transport motor vehicles under their own power, in interstate commerce, between California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming:

The protestants, by J. E. Tilford, Chairman of the Southern Freight Association, their agent, hereby object to the granting of such application for the following reasons:

1. Because neither the applicant nor its predecessor in interest was in bona fide operation on the date which deter- [fol. 94] mined eligibility for rights under the "grandfather" provisions, to-wit, June 1, 1935, for a common carrier or July 1, 1935, for a contract carrier.

2. Because the present or future public convenience and necessity or public interest do not and will not require the operation of such service.

The applicant had not on or prior to June 1, 1935, applied for or obtained a charter, certificate, permit, license or other appropriate authority from the State of South Caro-

lina authorizing service within, from, to, or through said State, nor otherwise complied with the laws of said State. Without such authority the applicant could not on or prior to said statutory date be in bona fide operation within the meaning of the "grandfather" provisions of the Motor Carrier Act, 1935, and is therefore barred from obtaining authority as a motor carrier of property under the said provisions.

The reference in the next preceding paragraph to South Carolina is not an admission that the applicant was in bona fide operation on or before said statutory date within, from, to, or through other States named in the application.

The protestants are individually and jointly interested in this matter because they operate within and through or from and to the States named in the application extensive lines of railroad engaged individually or jointly in the transportation of all kinds of freight traffic moving from, to, or between points in the States named in the application.

The protestants herein pray to be treated as parties hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, [fol. 95] and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

All of which is

Respectfully submitted, (Signed) J. E. Tilford, Agent for Protestants listed in the Appendix hereto.

Dated at Atlanta Ga., July 17, 1936. lrn. 101 Marietta St., Bldg., Atlanta, Ga.

(Sworn verification omitted.)

Appendix

List of Southern Rail Carriers, Protestants in the Foregoing Protest

Alabama Great Southern Railroad Company (The).
Alabama, Tennessee & Northern Railroad Corporation.
Atlanta, Birmingham and Coast Railroad Company.

Atlanta & St. Andrews Bay Railway Company.
Atlanta and West Point Rail Road Company.
Atlantic Coast Line Railroad Company.
Central of Georgia Railway Company.
Charleston & Western Carolina Railway Company.
Chesapeake and Ohio Railway Company (The).
Cincinnati, Burnside & Cumberland River Railway Company.
Cincinnati, New Orleans & Texas Pacific Railway Company (The).
Clinchfield Railroad Company.
Columbia, Newberry and Laurens Railroad Company.
Columbus and Greenville Railway Company.
Danville and Western Railway Company.
Florida East Coast Railway Company.
[fol. 96] Georgia and Florida Railroad.
Georgia Railroad.
Georgia Northern Railway Company (The).
Georgia Southern and Florida Railway Company.
Gulf and Ship Island Railroad Company.
Gulf, Mobile and Northern Railroad Company.
Harriman and Northeastern Railroad Company.
Interstate Railroad Company.
Louisville and Nashville Railroad Company.
Macon, Dublin & Savannah Railroad Company.
Mississippi Central Railroad Company.
Mobile & Ohio Rail Road Company.
Nashville, Chattanooga & St. Louis Railway (The).
New Orleans and Northeastern Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railroad Company.
Northern Alabama Railway Company.
Piedmont and Northern Railway Company.
Savannah and Atlanta Railway.
Seaboard Air Line Railway Company.
Southern Railway Company.
Tennessee, Alabama and Georgia Railway.
Tennessee Central Railway Company.
Western Railway of Alabama (The).
Winston-Salem Southbound Railway Company.
Wrightsville and Tennille Railroad Company.
Yazoo and Mississippi Valley Railroad Company (The).

[fol. 97] EXAMINER'S REPORT

Interstate Commerce Commission

No. MC-48654

John P. Fleming, Common Carrier Application

Report and Order

Recommended By A. E. Later, Examiner

Served September 10, 1937

By application [1] filed February 12, 1936, John P. Fleming, of Detroit, Mich., doing business as John P. Fleming Driveaway Service, seeks authority to continue operation as a common carrier by motor vehicle, limited to the transportation in driveaway service of automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles, in 12 States [2] passing through 14 others [3], over irregular routes.

In accordance with the provisions of the Motor Carrier Act, 1935, the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing has been held. Numerous motor carriers of automotive vehicles, individuals, Nicholson Universal Steamship Company and Detroit & Cleveland Navigation Company intervened but offered no evidence. National Automobile Transporters Association, Automobile Contract Carriers Association and International Harvester Company intervened and presented evidence on the jurisdictional [fol. 98] issue. Central Freight Association, western rail carriers, southern rail lines and numerous railroads opposed the granting of the application but did not present any evidence. The Railroad Commission of Texas and cer-

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[1] Under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935.

[2] Serving the States of Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington.

[3] Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia and Wyoming.

tain individuals in Nevada protested the granting of the application but did not appear at the hearing in support of their protests. The Public Service Commission of Missouri intervened in opposition to the granting of the application. Briefs were filed by various parties.

Applicant sought to amend the application by adding the States of Pennsylvania and New York as territory to be served. No ruling was made at the hearing on the motion to amend. The motion must be denied on two grounds; (1) No notice was given the regulatory bodies or other officials of the States named as required by the rules of the Commission; and (2) no notice was given interested parties that the application was for authority to operate in said States. The requirement of due process does not permit of unduly broadening the issues at the hearing, which would result from a granting of the proposed amendment.

Overland movement of automotive vehicles, other than by rail, is accomplished by one of the following methods: (1) By loading vehicles on a truck or tractor-trailer unit generally specifically designed for such purpose and transporting them to destination not under their own power; (2) individual driving of automotive vehicle under its own power; (3) driving one vehicle under its own power and towing another vehicle attached to the first by a mechanical device, generally called a tow-bar; and (4) by bolster mount or full mount which consists of driving one vehicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or of combinations of both. This proceeding involves the three last named and [fol. 99] are hereinafter referred to as the driveaway or caravaning methods of transporting motor vehicles.

The driveaway method was first employed during the World War when automobile manufacturers encountered difficulty in securing delivery of their products by rail. In 1928, a total of 3,971,102 new motor vehicles were shipped, of which 30.8 per cent were moved overland other than by rail, 64.7 per cent by rail, and 4.5 per cent by boat. In 1934, the total number shipped was 2,477,860 of which 48.8 per cent moved overland, 45 per cent by rail, and 6.2 per cent by boat. The driveaway and truckaway methods of transporting automotive vehicles occupy a position of major importance in the marketing of these vehicles. The driveaway method is also used in moving used vehicles.

A few concerns, such as applicant, transport exclusively by the driveaway method. However, the large majority of those engaged in overland transportation of such vehicles use both the truckaway and driveaway methods in their operations. The latter concerns usually truckaway for distances up to 600 or 800 miles, and driveaway for longer distances.

Applicant commenced operation of his driveaway service in 1932, and has been continuously engaged in that business to the present time. Attached to the application are a considerable number of copies of shipping or receiving orders covering the period from 1934 to 1936, which show the movement of 388 automobiles, commercial vehicles or trucks from Detroit to destinations in the 12 States [4] for which application is made, and of two automobiles to Agua Caliente, [fol. 100] Mex. A few of the cars were returned to Detroit for various rea ons. It also appears that applicant has transported cars by the driveaway methed from plants in Detroit to docks of steamer lines in that city for transshipment by water to interstate destinations. The record is silent as to whether this was done under a common control, management or arrangement with the steamer lines. It cannot be determined at this time whether or not such movement is subject to the Commission's jurisdiction.

Applicant submitted a statement after the hearing which shows that he transported a total of 1,581 automotive vehicles to destinations in the 12 States for which application is made, and 177 vehicles to points in Iowa, Illinois, Ohio, Missouri, Pennsylvania, New York and Maryland, during the period from March 16, 1933, to July 24, 1936. The origin of these shipments presumably was Detroit. Sixteen vehicles were moved to Michigan destinations, 13 in 1934 and 3 in 1935, but this movement does not appear to be subject to the Commission's jurisdiction; 26 vehicles to destinations in Washington, 14 in 1935 prior to June 1, and 6 in 1936; 8 vehicles to Oregon destinations, all in 1935;

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[4] Georgia 83 vehicles to 4 points, Kentucky 10 to 3 points, Michigan 20 to 2 points, North Carolina 56 to 3 points, Oregon 46 to 2 points, South Carolina 44 to 4 points, Tennessee 49 to 2 points, Texas 15 to 3 points, Washington 15 to 3 points, Alabama 36 to 2 points, Arkansas 9 to 2 points, and California 5 to 3 points.

and 4 vehicles to points in California, all after June 1, 1935. There is undoubtedly some duplication in this list and the shipping and receiving records attached to the application, but it is not substantial. This duplication apparently does not extend to Oregon, Washington and California, except in instances hereafter noted.

The shipping records show that 3 vehicles were moved from Detroit to Seattle, Wash., in April, 1935, 1 in December of that year, and 6 in February, 1936; 10 vehicles in February and 7 in April to Yakima, and 4 to Vancouver, Wash., in April, and 4 in May, all in 1935. Applicant transported 5 vehicles from Detroit to Portland, Oreg., in April, 11 in May, 13 in July, and 13 in October, and 4 each to Klamath Falls and Eugene, Oreg., in April, all in 1935. The [fol. 101] Klamath Falls movement is duplicated in the statement filed after the hearing. The shipping records attached to the application show 1 vehicle transported from Detroit to San Jose, Calif., in August, 1934, 2 to Los Angeles, Calif., in May, and 2 to San Francisco, Calif., in December, 1935. In 1935, or early 1936, a large caravan of taxi-cabs was driven from Detroit to Los Angeles, and a fleet of trucks and a considerable number of passenger cars to San Francisco, according to applicant's testimony. Applicant testified he had hauled to Bakersfield, Calif., and for two distributors in Los Angeles, but only in emergency service. The California business is of recent origin.

The first question raised by the parties to the proceeding is whether applicant's operation is within the jurisdiction conferred on the Commission by the act. It is claimed that driveaway service is nothing more than a chauffeur service. These parties point to the fact that no testimony was presented to the committees of Congress covering driveaway service nor was any mention made of this type of service in the committees' reports to the Congress. The gist of the contention is that a common or contract carrier by motor vehicle under the act is one which uses owned or leased motor vehicles in transporting passengers or property.

The contention cannot be sustained. Section 203 (a) (14) of the act defines the term "common carrier by motor vehicle" as any person who or which undertakes, whether directly or by lease or any other arrangement to transport passengers or property or any class or classes of property for the general public in interstate or foreign commerce by

motor vehicle for compensation. A contract carrier is one who or which transports passengers or property for compensation under special and individual contracts in interstate or foreign commerce. Section 203 (a) (19) provides that the "services" and "transportation" to which the act applies include all vehicles operated by, for, or in the [fol. 102] interest of any motor carrier irrespective of ownership or of contract, expressed or implied, together with all facilities and property operated or controlled by any such carrier and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

A common carrier which takes possession of property enters into a bailment contract to safely move such goods to a destination designated by the shipper and deliver them to the consignee named in the shipping document. In this respect, applicant's operations are identical and the responsibilities to the shipper are the same as those of any common carrier. Applicant holds himself out to move motor vehicles for anyone who may request it to destinations in any of the States for which application is made. When a distributor or dealer desires to have a vehicle moved, applicant is notified and he takes such vehicle or vehicles into his possession, assumes all the responsibilities of a carrier during the time such vehicle is in his possession, settles claims for loss and damage to the property while in his possession, carries insurance to protect himself against the liability he has assumed, pays the driver of the vehicle, selects the routes over which it is to be moved and, in fact, exercises complete dominion over the property. In consideration of the charges to be paid applicant for his services, it is understood that the vehicle to be moved is to be operated under its own power in carrying out the terms of the bailment contract. Where there are several vehicles to be moved it is understood by the shipper that some of them will be driven and others towed or mounted.

It is contended by those who claim the Commission does have jurisdiction that, from a practical standpoint, assumption of jurisdiction is necessary. They point to the fact that it is a common practice to use both truckaway and driveaway in delivering vehicles. They insist that it would [fol. 103] be impractical, if not impossible, to segregate their operations and charges so as to comply with the act, if the driveaway portion was exempted.

Considerable emphasis is laid on the definition of "transportation" by those claiming that the Commission does not have jurisdiction over driveaway service. The ordinary dictionary definition is that "transportation is the carriage of passengers or property," which implies, they say, something other than movement of an automotive vehicle under its own power. Such a narrow definition of "transportation" does not conform with the definition of that term in section 203 (a) (19), nor with the policy of Congress expressed in the act.

The intent of Congress was regulation of motor vehicles operated in interstate or foreign commerce. To exempt driveaway of motor vehicles from the operation of the act merely because the vehicle being moved in interstate or foreign commerce is the property to be transported and furnishes the motive power, would seem to defeat the purpose of Congress. It must be concluded that the transportation regulated by the act includes any transportation of passengers or property for compensation in interstate or foreign commerce which is accomplished by a motor vehicle, irrespective of ownership of the vehicle.

The above conclusion is supported by the interpretation by the courts of the phrase "transportation of a stolen motor vehicle in interstate commerce." A federal statute makes transportation of a stolen motor vehicle in interstate commerce a criminal offense. The gist of the offense is transportation in interstate commerce. The courts have repeatedly sustained convictions where a person has stolen a motor vehicle and driven it across a State line.

[fol. 104] It is contended by intervening rail carriers that if applicant is held to be a carrier, he is a contract carrier, and not a common carrier. They point to the fact that he transports vehicles for not more than one shipper at each of the destinations in the States for which application is made, and that in Oregon applicant has a permit as a contract carrier for a firm of automobile dealers at Portland. Applicant also has a permit to drive and tow automobiles in the State of Nebraska for this firm. At the time of hearing, applicant had filed neither a tariff nor a schedule of minimum rates because of the doubt that existed as to whether his operations were subject to the act, but promised to file a tariff without delay.

The evidence shows that applicant obtained his business by solicitation of dealers and distributors of automotive

vehicles; that he has no written contracts; and that prevailing verbal contracts are merely with respect to the amount to be charged per vehicle. Applicant stated that he would transport automobiles for anyone requesting him to do so and that he now holds himself out to transport automobiles by the driveaway method between any points in the States for which application has been made. There is nothing in the record which would indicate that applicant had refused to transport motor vehicles for anyone who had requested his service.

The mere fact that applicant only hauls for one automobile dealer or distributor at a given point is not significant. Applicant holds himself out to serve the general public and that is the controlling factor in determining his status as a carrier. No. MC 50039, *Drexel Clair Tucker, Contract Carrier Application*, — M. C. C. —. It must be concluded, therefore, that applicant is a common carrier by motor vehicle.

The rail carriers contend on brief that applicant's operation lacks *bona fides* because he had failed to procure certificates from States through or into which he operates. Attached to the application are receipts for taxes paid to [fol. 105] Nebraska, Wyoming, Idaho, Utah, Kansas and Arkansas, which taxes were exacted by those States for the privilege of driving and towing vehicles. Applicant admitted that he did not hold certificates from most of the States into or through which he operates. He testified, however, that he had made inquiry, generally of automotive vehicle dealers with whom he did business in the various States, as to the certificate requirements of such States, and that, with one or two exceptions, he had been informed that certificates were not required.

As heretofore stated, applicant has a contract carrier permit in Oregon and a permit to tow motor vehicles on the highways of Nebraska for a motor company of Portland. Applicant testified that he had operated through the State of Missouri for a considerable period prior to being informed that a certificate was required in that State. The record fails to show when this information was transmitted to applicant. However, the Missouri Public Service Commission decided on December 24, 1935, that a carrier such as applicant was subject to the Missouri law, approved in 1929, and designed to regulate common and contract carriers by motor vehicle. In view of the finding in No. MC 2600,

Earl W. Slagle, Contract Carrier Application, — M. C. C. —, the contention of interveners cannot be sustained. It was held there that the possession of a State certificate was not a condition precedent to the issuance of a certificate or permit under the "grandfather" clauses of the act. The true test of *bona fide* operation was held to be actual operation in the conduct of a legitimate transportation business for hire without subterfuge, deceit, or concealment. Applicant's operations fully meet the test of *bona fide* operation, as laid down in the above cited case.

Applicant's discontinuance of operation in Missouri because he did not have a certificate to operate on the highways of that State is not a circumstance beyond the control [fol. 106] of applicant and his failure to continue operating therein, subsequent to June 1, 1935, forfeits any right which applicant may have had under the "grandfather" clause.

Interveners devoted considerable space in their brief to the question of whether the Commission was required to take judicial notice of State laws pertaining to the regulation of motor carriers and regulations issued thereunder. They insist it is the duty of the Commission to take judicial notice of these laws because members of joint boards, who cooperate in the administration of the act, have knowledge of such laws and regulations and that this knowledge must be imputed to the Commission. They admit, however, that where it is claimed that a State law has been violated, the particular law or regulation violated must be pointed out to the Commission. The only instance where it was claimed that a State law or regulation required a certificate of a carrier such as applicant is that of Missouri. In view of the finding in the *Slagle case*, extended discussion of this contention is unnecessary. It is sufficient to point out that whether or not the Commission will judicially notice a particular fact is one for decision in each case where the fact is essential to an appropriate disposition of the issues. It is not for the Commission in the first instance to decide that a particular State law or regulation has been violated. That is the province of State authorities. The Commission cannot judicially notice a violation of a State law unless such violation is called to the Commission's attention. Here the question of whether or not applicant was required to obtain certificates from any State is not pertinent to the decision of the case.

The railroad interveners contend further that applicant should be required to confine his operations to fixed routes and between fixed termini. They point to the fact that in [fol. 107] serving points in California, Oregon and Washington, applicant had followed U. S. Highway 30 for the greater part of the distance to those points. They further insist that since applicant only served a relatively few points in each of the States for which application is made, that the certificate issued to him should be confined to those points. This raises a question as to the extent of territory which should be given an applicant under the "grandfather" clause.

In deciding that question it is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are irregular in nature and necessarily so because of conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended for, might well destroy applicant's usefulness. The primary test in each case is the requirements of the public. As applicant points out, restrictions of his operation to fixed routes and fixed termini would seriously handicap the conduct of his business and tend to prevent him rendering the type of service which the industry requires. The particular operation requires great flexibility, both as to routes and as to points to be served. Under the circumstances it must be concluded that applicant is entitled under the "grandfather" clause to serve all destinations in each of the States for which application has been made without restriction of route.

The record shows that applicant has only hauled from Detroit to destinations in these States. Authority is apparently sought to operate between all points in each of the States for which application has been made both as to origins and destinations. There is nothing in the evidence [fol. 108] which shows that applicant requires such widespread origin authority except for the return of vehicles to Detroit that have been rejected by the dealer or distributor.

The railroad interveners further contend that since applicant, with minor exceptions, has hauled but one make of motor vehicle, he should be confined to that one make. They further contend that since the vehicles hauled on June 1, 1935, and since that time were new automobiles, any certificate should be limited to the hauling of new vehicles only. These contentions require little discussion. Applicant testified he did not confine his operation to one make of vehicle and other evidence of record corroborates this. He has hauled used automotive vehicles but was not doing so at the time of hearing. The only purpose of such a restriction would be to limit the scope of operation of a motor carrier and prevent adequate service to the public. If Congress had intended any such limitations it would have expressed them in clear language. The contention cannot be sustained.

The examiner finds that applicant was in *bona fide* operation as a common carrier by motor vehicle of automotive vehicles in interstate or foreign commerce over irregular routes between Detroit, Mich., and points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, operating through Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia, and Wyoming on June 1 1935, and has so operated since that time, and that a certificate should be issued authorizing him to continue such operation. In all other respects the application should be denied.

It is recommended that the appended order be entered.

(Signature) A. E. Later, Examiner.

[fol. 109] Recommended by A. E. Later, Examiner. (Signature) A. E. Later.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Order of the Interstate Commerce Commission, Division 5, effective on the — day of —— A. D. 1937

No. MC-48654

John P. Fleming, Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by A. E. Later, Examiner, who has made and filed a report herein containing his findings of

fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with all requirements of sections 215 and 217 of the Motor Carrier Act, 1935, and the rules and regulations promulgated by the Commission thereunder, a certificate of public convenience and necessity be issued to John P. Fleming, doing business as John P. Fleming Driveaway Service, authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of automotive vehicles, over irregular routes, between Detroit, Mich., and points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington, operating through Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia, and Wyoming.

It is further ordered, That the above-described certificate be issued upon the condition that the operations authorized thereunder shall be conducted in accordance with all rules, regulations, and requirements relating thereto issued by the Commission under the Motor Carrier Act, 1935.

It is further ordered, That in all other respects, said application be, and it is hereby, denied.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 110] EXCEPTIONS OF INTERVENING RAIL CARRIERS TO PROPOSED REPORT AND ORDER

Before the Interstate Commerce Commission

Docket No. BMC-48654

In the Matter of the Application of JOHN P. FLEMING for a certificate authorizing transportation of motor vehicles under their own power in interstate commerce between Detroit and certain western and southern states

Exceptions to Proposed Report and Order Recommended By A. E. Later, Examiner

(Filed by all of the railroads appearing)

Come now these intervening rail carriers and except to the report and order recommended by A. E. Later, Examiner, in the following respects:

I. The Examiner erred in finding that applicant was "in bona fide operation" regardless of his having failed to comply with certain state laws which pertained to his right to operate.

II. The Examiner erred in failing to judicially notice the language of certain state laws.

III. The Examiner erred in extending to applicant the right to serve any and all points in each of the states named on a mere showing of previous service to only a limited number of points in each of such states.

[fol. 111] IV. The Examiner erred in failing to require applicant to follow specific routes through certain intermediate states.

V. The proposed order is not consistent with the proposed report in not limiting applicant's permitted operations in the manner specified in the report.

VI. The Examiner erred in failing to limit applicant's authority to the transportation of new passenger automobiles only.

Dated September 28, 1937.

Henry P. Stacy, Frederick V. Slocum, Joseph H. Hays.

[fol. 112] PETITION OF INTERVENING RAIL CARRIERS FOR REARGUMENT

(From District Court Ex. 1)

Before the Interstate Commerce Commission

Docket No. BMC-48654

In the matter of the application of JOHN P. FLEMING for a certificate authorizing transportation of motor vehicles under their own power in interstate commerce between Detroit and certain western and southern states

PETITION OF INTERVENING RAIL CARRIERS FOR REARGUMENT AND RECONSIDERATION BY THE ENTIRE COMMISSION OF THE REPORT OF THE COMMISSION BY DIVISION 5, COMMISSIONERS EASTMAN, LEE AND ROGERS, ENTERED IN THIS PROCEEDING ON SEPTEMBER 19, 1938, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

(Filed by all Railroads appearing)

Come now the Intervening Rail Carriers above-named, and respectfully petition the Commission to grant reargu-

ment and reconsideration before the entire Commission of the report of the Commission by Division 5, Commissioners Eastman, Lee and Rogers, in the above-entitled proceeding and in support of said petition respectfully show:

I

That because of the broad scope of authority authorized in said Commission's order and the adverse effect the granting of such authority would have on existing transportation agencies and the public generally, and the fact that the report of the Commission in this proceeding as made by Division 5 would be controlling in a large number of cases and under so many circumstances not prevalent in the instant case, the counsel and decision of the entire Com- [fol. 113] mission in this proceeding is required in the public interest.

II

The report of the Commission as made by said Division 5 is in error in holding applicant was "in bona fide operation" regardless of his having failed to comply with certain state laws pertaining to his right to carry on business. (Sheet 7)

III

The report of the Commission as made by Division 5 is in error in finding, "It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends for its traffic entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles." (Sheet 5)

IV

The report of the Commission as made by Division 5 is in error in that it finds, "Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent him rendering the type of service he has been performing." (Sheet 6)

V

The report of the Commission is in error in finding, "Although operations to Arkansas, Texas, Oregon and Washington were started just prior to June 1, 1935, they were sufficient in scope to establish that applicant was in bona fide operation in those states on the statutory date." (Sheet 6)

[fol. 114]

VI

The report of the Commission is in error in finding, "that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation. As an incident to the operation, applicant may transport to Detroit from any point in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor." (Sheet 7)

VII

The report of the Commission is in error in that the evidence of record is insufficient to support the conclusions reached.

VIII

The report of the Commission is in error in that upon only a showing of previous service to isolated points under the "grandfather" clause, applicant is given authority to serve all points within the several destination states most of which points having never been served by applicant, and many of which points were not served prior to June 1, 1935, and many other of which points were not served subsequent to such date.

IX

The report of the Commission is in error in that such report does not construe the said "grandfather" clause of [fol. 115] said Section 206 in the light of the general purpose of the Act nor apply such construction with a view to effectuating such purpose.

X

The construction of the "grandfather" clause both with reference to the meaning of the words "in bona fide operation" and with reference to the territorial scope of authority to be granted which was adopted in the report is impractical.

XI

The reasons cited in the report for rejection of the construction of the "grandfather" clause urged by these objectors are unsound.

XII

The report of the Commission is in error in that the evidence is not sufficient to support its findings.

XIII

In support of the foregoing propositions reference is hereby made to the brief filed by Intervening Rail Carriers in this proceeding, dated August 13, 1936, and to the exceptions of Rail Carriers to the Examiner's recommended report filed in this proceeding under date of September 28, 1937, and the brief in support thereof, which briefs and exceptions are, by reference, made a part hereof.

Wherefore, petitioners pray that reargument and reconsideration by the entire Commission be granted in the above-entitled cause; that a date be fixed for reargument and that the Commission enter such further order or orders and grant such further relief in the premises as may seem reasonable and just.

Dated at Chicago, Illinois, this 12th day of October, 1938.

Henry P. Stacy, Frederick V. Slocum, Amos M. Mathews, Richard W. Sharpless, Joseph H. Hays, Attorneys.

[fol. 116] PLAINTIFF'S EXHIBIT NO. 2

ABSTRACT OF THE EVIDENCE RECEIVED AT THE HEARING BEFORE THE EXAMINER, JULY 23, 1936

(Page references are to plaintiffs' District Court exhibit 2, which is a certified copy of the reporter's transcript of the testimony received before the Examiner)

Appearances: Carney D. Matheson and George S. Dixon, for applicant, John P. Fleming, etc.; L. E. Smith, for intervenor, Kenosha Auto Transport Corporation; Daniel C. Rogers, for Public Service Commission of Missouri; Joseph H. Hays, for intervening western rail carriers, protestants; Frederick V. Slocum, for members of the Central Freight Association, and the Missouri Pacific Railroad Company, St. Louis-Southwestern Railroad Company, and Texas and Pacific Railroad Company; Henry P. Stacy, for New York Central Railroad Company; S. E. Gregory, for Chicago and North Western Railroad Company, Charles P. Megan, Trustee; R. P. DeCamp, for Illinois Central System.

JOHN P. FLEMING (applicant in the proceedings before the Interstate Commerce Commission) testified as follows (Plaintiffs' Ex. 2, pp. 6-93, 100-136):

I live in Detroit, Michigan and I am engaged in business under the name of John P. Fleming Driveaway Service. I do business as an individual under a registered trade name. My principal place of business is Detroit, Michigan. I am engaged in the business of transporting automobiles, trucks, [fol. 117] chassis and unfinished automobiles, to various parts of the country by the so-called driveaway method, by driving them under their own power; and have been so engaged since 1932. The driveaway operation is conducted in four ways: single car; tow-away, attaching one car with a steel towbar behind another car; bolster mount where the front end of the second vehicle is mounted on the rear end of the front vehicle by means of an apparatus for that purpose; and full mount where one vehicle carries another. Applicant's Exhibit 1 (in plaintiffs' Ex. 3 in this case) was admitted in evidence and shows these methods of hauling.

I transport motor vehicles by these various methods for any concern that requests my services, holding myself out as a common carrier, both in interstate and intrastate commerce, the larger part of the movement being interstate.

Q. You state in your application that you have operated prior to June 1, 1935, in the States of Alabama, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming, and with the corrections that were made at the commencement of this hearing in the States of Pennsylvania and New York. Are you still conducting service in and to those states at the present time?

A. Yes sir.

Q. Does that state the territory that you wish to be covered by your certificate if one is issued to you?

A. That is right.

Q. From what points and to what points within the specified territory do you operate, Mr. Fleming?

[fol. 118] A. From the manufacturers and warehouses to distributors and dealers. Of course, the movement is largely out of Detroit and we have some automobiles returning, but very few.

Q. Do you confine your movement between any fixed termini or fixed territory or over any fixed routes?

A. Well, we cannot do that for obvious reasons.

Q. Explain why you cannot do that.

A. Well, the dealers are situated all over this territory, and naturally it is to our advantage to use the most direct routes and the best roads, and therefore we cannot use fixed routes because our operations are changing from time to time, and because the dealers' accounts change and new business changes its location.

Q. In other words, the inherent nature of your business is the direct movement of these motor vehicles?

A. That is right.

Q. To various people in the territory which you serve?

A. Yes.

Q. In other words, the extent of that operation has really been determined by the business offered to you regardless of destination or point of origin?

A. By the demand.

My operations are subject to fluctuation as automobile production fluctuates. My business drops off during the month of September, the change-over period in the automobile industry. I have a fairly extensive operation for about ten and one-half months of the year and during the change-

over to the new models I confine my operations to only a few. [fol. 119] Q. In operating through these various states and conducting your business, Mr. Fleming, have you complied with all the laws of these various states in and through which you operate?

A. I have complied with all the requirements that have been made upon me. (Plaintiffs' Ex. 2, pp. 10-12.)

In a general way I know the requirements in the various states in which I operate. In traveling from Detroit to Portland, Oregon, the first state which we pass through that requires a permit is Nebraska, and I have complied with all of their requirements, and the other requirements are simple, a license plate for each automobile and a towing fee of ten dollars for the rear car, that is, the car which is towed.

The next state is Wyoming; they require $1.50 road tax, and a dealer's plate on each automobile. These license plates are used on all automobiles passing through the state.

The next state is Idaho, and in the year 1935 they required license plates on each automobile, either Idaho dealer license plates and these license plates I purchased and used until, I don't recall the exact month, but I believe it was in June when they discontinued the use of license plates, and put into effect a law requiring a five dollar tax, a special tax, on each automobile passing through the state. I have paid that tax on each automobile that passed through the state since the inception of the law.

The next state, of course, is Oregon. I have had dealer plates in Oregon. I have had plates and I had them in 1935, and had them in 1936, and in addition to the plates they require a special tax this year of $2.50, and that I paid. Then I have special taxes between here and Portland. [fol. 120] I have complied with all of the state requirements and paid all taxes on every automobile that passed through there.

Now, we will take the State of Utah, because we are going now to San Francisco over the same route, and the State of Utah requires a permit, and it did not require a permit, or I don't think they did in the year 1935. It was merely the latter part of this year, and I have a permit now.

The next is Nevada. Now, just a minute before we pass through Colorado, I believe in going through Nevada they require $7.50 special tax on each automobile, and this tax we paid. No permit is required.

At California the port of entry, there are no requirements for a permit Special tax at times is enforced. When the tax is enforced it is $15 per car. It has only been in force few times, and it seems that that is taken out at times. I believe that covers my routes to the west coast.

Now, then, the State of Missouri requires a permit, and for the past year, since this permit has been required, my operations have not taken me through the state. In the past few months they have not. I applied to an attorney to secure this permit and he has appeared before the Commission. I do not have a Missouri permit.

I am not using the Missouri highways at this time. I am in the process of securing a permit.

In the State of Colorado I have a permit.

Now, I believe that covers the western states. Now, coming back east and going into the southwest, we pay a special tax in Oklahoma, but they require no permit. We pay a permit in Texas. That is called a convoy permit for automobiles passing through the state, if they are consigned to dealers outside. If they are consigned to dealers within [fol. 121] the state the permit is not necessary.

In the State of Arkansas we pay a special fee. This we pay.

In the State of Alabama I have a permit, and I have an Alabama special plate.

In the State of Tennessee we pay a road tax on commercial vehicles only.

In the States of Kentucky, Georgia, North Carolina, South Carolina, Ohio, Michigan, Indiana, Illinois, no license is required and no permit. At least they have not been required for my operations.

In the states that merely require a plate I just attach them to the truck and receive no documentary evidence as to those plates. (Plaintiffs' Ex. 2 pp. 13-16.)

Applicant's exhibits 2 to 8, both inclusive, were admitted in evidence (Plaintiffs' Ex. 2 p. 16; these exhibits are found in plaintiffs' Ex. 3).

Applicant's exhibit 2 consists of fifteen permits, all dated December 30, 1935, all granted to Cohen and Anderson Motor Co. of Portland, Oregon, to drive cars through the State of Nebraska. They were all in one shipment. That is just a sample of the permits I have obtained in Nebraska. The act requiring them became effective in

September, 1935, and since that time I have obtained a receipt for every automobile driven through the state. (Plaintiffs' Ex. 2 pp. 16-17.) (As these permits are all similar, a copy of one of them is here set out as follows):

[fol. 122] Total $14.00

STATE OF NEBRASKA

Department of Roads and Irrigation

Omaha, Nebraska Dec. 30th, 1935

No. 60 Permit

To tow a motor vehicle on the highways of Nebraska.
Issued Douglas County

Receipt of $14.00 fee is hereby acknowledged and permission is thereup granted to Cohen Anderson Motor Co.

Name

14th & Adler	Portland	Oregon
Street	City	State

to tow the following described motor vehicle on the highways of Nebraska from Detroit, Mich., to Portland, Oregon between 12/23 1935, and 1/4 1936

Vehicle being towed Terraplane Style of Body Coupe
Year Motor Wood.....Model.....
Made 1935 Number 177356 Wheels Steel Disc Number.....
Wire.....or Letter 61
Number of Seating or Unloaded
Cylinders 6 Hauling Capacity 2 Weight 2785#
License Number 6307 Fee $1.50
Towing Vehicle Hudson Style of Body Sedar
Year Motor Wood.....Model.....
Made 1935 Number 6633 Wheels Steel Disc Number.....
Wire.....or Letter 65
Number of Seating or Unloaded
Cylinders 8 Hauling Capacity 5 Weight 3285#
License Number 6305 Fee $2.50
Permit Fee..... $10.00
Name of Insurance or Indemnity Company (Seal)
Standard Accident Ins. Co.

Signed County Treasurer

Policy Number JC 383116

By J. H. Hansen
Clerk

Amount $ PL 25000/50000
PD 5000
Cohen-Anderson Motor Co.
Signed Joe Lessard
Applicant

Applicant's Exhibit 3 (contained in plaintiffs' Ex. 3) is a receipt for $12.00 from the Wyoming Highway Department, dated February 27, 1936, for a license to drive two new G. M. C. trucks through the State of Wyoming. With [fol. 123] applicant's Exhibit 3 is an automobile caravan permit dated March 15, 1936, for $17.00 for driving seventeen automobiles through the City of Cheyenne, Wyoming, in compliance with a city ordinance. Both were made out to Fleming. (The following is a copy of the receipt for state fees):

Wyoming Highway Patrol

Date 2 27 1936

Received from Flemming Drive Away Co.
Twelve & no 100 ..... Dollars
T 793
For License to 2 GMC Trucks Motor T 797
1/2 ton pick ups

Reed Koons
Highway Patrolman

$12.00

Applicant's Exhibit 4 (contained in plaintiffs' Ex. 3) consists of three receipts for dealer's license plates in the State of Idaho; one issued to John P. Fleming, dated February 26, 1935; one to Hollace G. Rice, dated May 18, 1935; and one to John Ellison, dated April 12, 1935. (The following is a copy of the Idaho receipt issued to Fleming):

1935 Idaho Motor Vehicle Dealer's Application 1935

Commissioner of Law Enforcement No. 332 A
Boise, Idaho to K

Sir:

I hereby make application through the Assessor of Canyon County for a Dealer's Motor Vehicle License for the year 1935 under the provisions of Chapter 1 Title 48 Idaho Code Annotated.

Name of Dealer John P. Fleming
Style of Firm ..... Place of Business 12801 Kerchival Ave.
Address Detroit County .....
Make of vehicle sold or manufactured .....
John P. Fleming Per Clydesdale Applicant.

Subscribed and sworn to before me this 26 day of Feb., 1935
Fees $60.00 30.00
pd.
This serves as a receipt Emmitt Pfost, Assessor
when stamped by Assessor By Pearl Cavin, Deputy

[fol. 124] Applicant's Exhibit 5 (contained in plaintiff's Ex. 3) consists of two receipts issued by the Utah State

Tax Commission, each for $20.00, each to Fleming, one a license as a dealer in motor vehicles dated March 17, 1936, and the other a license as a transporter dated May 14, 1936. I do not believe this was in effect in 1935, because we went through the state in 1935 and there was no requirement made. (The following is a copy of the dealer's license issued to Fleming by Utah, the transporter license being similar except that he is described as a transporter):

Form TC-120 Rev. 1-1-36 No. 1258

STATE OF UTAH

State Tax Commission

License

For the calendar year 1936

Salt Lake City, Utah
Date Mar. 17, 1936

For the payment of the sum of Twenty.....Dollars by the person below named, he hereby is licensed to conduct the business of Dealer in motor vehicle trailers, or semitrailers at Detroit, Michigan for the calendar year 1936 upon the condition that he complies with the laws of this State with reference to the registration of vehicles and certificates of title therefor. This license is issued under the authority of Section 97, of Chapter 46, Laws of Utah 1935.

Issued to:
John P. Fleming Driveaway Co.
12801 Kercheval
Detroit Michigan

Issued by:
State Tax Commission,
Irwin Arnovitz,
Chairman.

This license is not transferable—To be posted in a conspicuous place.

Applicant's Exhibit 6 (contained in plaintiffs' Ex. 3) consists of two "Carrier's Registration Card and Permit" issued by the Kansas Port of Entry Board, Port No. 1, one to the Heidtman Motor Co., Reno, Nev., dated March 20, [fol. 125] 1936; the other to General Motors, Detroit, Mich., dated February 22, 1936. Both show Michigan license tag 2010. Kansas charges a road tax of two cents per mile for passing through the state. It is my practice to use this receipt in the name of the consignee of the automobiles. That license number is mine and it identifies the receipt as mine. This purports to represent a payment for a car which I was driving for a customer from Michigan through Kansas to Reno, Nevada. (Plaintiffs' Ex. 2 pp. 17-20.)

(This exhibit was admitted, over objection of plaintiffs, with the stipulation that it should be stricken if no connection with it to Fleming is established. Plaintiffs' Ex. 2 p. 20.) (The following is a copy of the permit issued Heidtman Motor Co., the permit issued the General Motors being similar):

No. 413890

KANSAS PORT OF ENTRY BOARD

Carrier's Registration Card and Permit

Port of Entry # 1
Owner Heidtman Motor Co. Address Reno, Nev.
Company ..... Date 3-20-36
License Tag 2010 Mich. Permit Spec. Motor No. 15696
Serial
No. .....Make and Kind of Vehicle Nash & Laf Rated Cap 1/2
Insurance Standard Accident Ins.
Weight
Empty Weight 2800 of Cargo 2800 Gross Weight 5600
Origin of Shipment Racine, Wis. Destination Reno, Nev.
Route 36-7-59 Top. 24-N 40 To leave State Kanorado, Ks.
Taxable Miles 438 Exempt Miles ..... Rate 1½
Driver Ted Blizen I have / I have no } intoxicating liquor on the above listed equipment.

(Signed) .....
Driver

Amt. Tax Paid, $67.80

(Signed) .....Hays.....
Triplicate: To driver Inspector

[fol. 126] Applicant's Exhibit 7 (part of plaintiffs' Ex. 3) is a receipt for an application for "In Transit Tag" in the State of Arkansas. This is a requirement to drive new automobiles through the state, and we paid a tax on every automobile passing through the state. (The following is a copy of such application):

DEPARTMENT OF REVENUES

Earl R. Wiseman, Commissioner

Little Rock, Ark.

Fee $1.50 Each Tag — 10-23 1935

Application For
In Transit Tag

Received of (Name illegible) Transport
Address Detroit, Michigan
the sum of Six and no/100.....Dollars $6.00
for 4 In Transit Tags @ $1.50 each.
(No. Tags Issued)

By Ira Hall
Title 85
County Miss.

No. 1454
3:30 P. M.

Motor vehicles and trailers in the course of delivery from a manufacturer to a dealer, or from one dealer to another, may be operated on the highways without license number plates being attached thereto, provided they display on the rear a placard bearing the words "In Transit," the registration number, the time and date said placard was issued, and the genuine signature of the Commissioner of Revenues or his agent. The fee shall be $1.50 for each vehicle and applies to all motor vehicles operated on the highways of this State which are in transit from manufacturer to a dealer, or from one dealer, whether the same are driven or towed.

Insert The Numbers of Placards
Issued in Space Below

From 8-585 To 8-598 MC

Applicant's Exhibit 8 (part of plaintiffs' Ex. 3) is a towing permit issued by the State of Nebraska authorizing Cohen-Anderson Motor Co., of Portland, Oregon, to tow a certain described motor vehicle across the State of Nebraska between October 12, 1935 and October 18, 1935. It is the practice in Nebraska to make out these permits in [fol. 127] the name of the dealer to which these cars are consigned and not to the transport company, and therefore, in this exhibit the name of the Cohen-Anderson Motor Co. appears instead of Fleming Driveaway Co. This permit was issued for an automobile driven by the Fleming Driveaway Service for the Cohen-Anderson Motor Co. but the application does not use Fleming's name.

All of these receipts and permits were obtained by me or my duly authorized agent in the movement of cars in and

through the states and territories which I serve. These receipts are merely a representative number. I made no effort to obtain all of the receipts through all of the states prior to June 1, 1935.

Q. Now, in the states that you do not have receipts for, do you either have license plates or they have no law as to driveaway business, is that right?

A. I have a permit in Alabama. I am unable to find it on file in my office.

Q. The reason for not producing the license plate is that they are being used in your business at the present time?

A. Yes. (Plaintiffs' Ex. 2 pp. 21-22.)

Applicant's Exhibit 9 was admitted in evidence. (Pltfs'. Ex. 2 p. 23.) This exhibit consists of the original shipping bills which are attached as an exhibit to the original application for authority filed by the applicant with the Interstate Commerce Commission. (They are a part of plaintiffs' Ex. 1 in this case).

(These shipping bills show shipments of automobiles on the dates and to the destinations shown below, arranged by states. Within each state shipments are divided into two main groups, those on or before June 1, 1935, and those after June 1, 1935. In each main group the shipments are shown by cities, arranged alphabetically.)

[fol. 128]

ALABAMA

On or before June 1, 1935

August	17, 1934	Birmingham	12 Hudsons
September	7, 1934	"	4 Hudsons
March	29, 1935	"	4 Hudsons
April	3, 1935	"	4 Hudsons
May	20, 1935	"	6 Hudsons

After June 1, 1935

December	3, 1935	Birmingham	1 Hudson 1 Terraplane
July	2, 1935	Montgomery	4 Terraplanes

ARKANSAS

On or before June 1, 1935

March	9, 1935	Texarkana	5 Terraplanes
April	3, 1935	"	4 Terraplanes 1 Hudson

CALIFORNIA

On or before June 1, 1935

May	22, 1935	Los Angeles	1 Hudson 1 Terraplane
August	14, 1934	San Jose	1 Hudson

After June 1, 1935

December	11, 1935	San Francisco	1 Hudson 1 Terraplane

GEORGIA

On or before June 1, 1935

October	6, 1934	Atlanta	6 Hudsons
December	5, 1934	"	4 Hudsons
January	26, 1935	"	8 Hudsons
April	16, 1935	"	2 Cars
April	18, 1934	Augusta	4 Hudsons
August	7, 1934	"	4 Hudsons
February	21, 1935	"	4 Cars
March	27, 1935	"	4 Cars
March	13, 1935	Columbus	4 Hudsons
May	29, 1935	"	2 Terraplanes
December	24, 1934	Savannah	5 Hudsons
March	27, 1935	"	4 Cars
May	8, 1935	"	4 Hudsons
May	15, 1935	"	2 Dodges

After June 1, 1935

November	2, 1935	Atlanta	6 Terraplanes 1 Hudson
October	31, 1935	Augusta	4 Terraplanes 1 Hudson
December	6, 1935	Columbus	6 Terraplanes
July	25, 1935	Savannah	2 Dodges
November	6, 1935	"	2 Dodges
November	22, 1935	"	3 Terraplanes 1 Hudson

[fol. 129]

KENTUCKY

On or before June 1, 1935

April	17, 1935	Corbin	2 Dodges
June	15, 1934	Louisville	1 Dodge Truck
May	29, 1934	Williamsburg	2 Hudsons
July	27, 1934	"	2 Hupmobiles
May	7, 1935	"	4 Dodges
May	16, 1935	Corbin	1 Dodge
		Williamsburg	1 Plymouth

MASSACHUSETTS

On or before June 1, 1935

March	12, 1934	Boston	4 Hudsons

MICHIGAN

On or before June 1, 1935

October	18, 1934	Battle Creek	5 Hudsons
May	8, 1935	Detroit	3 Hudsons

NEW YORK

On or before June 1, 1935

October	5, 1934	Buffalo	8 Hudsons

NORTH CAROLINA

On or before June 1, 1935

December	27, 1934	Asheville	4 Hudsons
February	25, 1935	"	2 Cars
May	9, 1935	"	2 Hudsons
January	15, 1935	Charlotte	9 Hudsons
February	15, 1935	"	7 Hudsons
May	15, 1935	"	4 Hudsons
November	21, 1934	Raleigh	6 Terraplanes
			1 Hudson
February	21, 1935	Raleigh	9 Cars
May	9, 1935	"	4 Hudsons

After June 1, 1935

November	15, 1935	Asheville	2 Hudsons
September	23, 1935	Charlotte	2 Grahams
November	27, 1935	Raleigh	3 Hudsons
			1 Terraplane

OREGON

On or before June 1, 1935

April	12, 1935	Klamath Falls	4 Cars
April	23, 1935	Portland	5 Hudsons
May	13, 1935	"	11 Hudsons

After June 1, 1935

July	19, 1935	Portland	11 Terraplanes
			2 Hudsons
October	28, 1935	"	5 Hudsons
			8 Terraplanes

[fol. 130]

SOUTH CAROLINA

On or before June 1, 1935

August	20, 1934	Columbia	6 Hudsons
November	30, 1934	"	4 Cars
February	22, 1935	"	8 Hudsons
April	9, 1935	"	4 Hudsons
May	8, 1934	"	4 Hudsons
April	4, 1934	Greenwood	2 Hudsons
December	11, 1934	Hartsville	4 Cars
January	24, 1935	"	4 Cars
April	19, 1935	"	2 Cars
September	13, 1934	Lake City	2 Hudsons
November	8, 1935	Columbia	5 Terraplanes
December	6, 1935	Hartsville	3 Terraplanes

TENNESSEE

On or before June 1, 1935

January	16, 1934	Chattanooga	4 Hudsons
May	29, 1934	"	2 Terraplanes
December	14, 1934	"	4 Cars
March	1, 1935	"	4 Cars
May	16, 1935	"	2 Cars
June	19, 1934	Knoxville	4 Hudsons
July	31, 1934	"	4 Hudsons
November	5, 1934	"	2 Hupmobiles
January	29, 1935	"	4 Hudsons
March	2, 1935	"	8 Cars
April	9, 1935	"	4 Cars

After June 1, 1935

December	18, 1935	Chattanooga	2 Hudsons 4 Terraplanes
December	13, 1935	Knoxville	2 Terraplanes

TEXAS

On or before June 1, 1935

January	3, 1935	Tyler	1 Terraplane 3 Hudsons

After June 1, 1935

December	21, 1935	Laredo	2 Hudsons 4 Terraplanes
January	3, 1936	Marshall	2 Hudsons 3 Terraplanes
January	3, 1936	Paris	4 Terraplanes

WASHINGTON

On or before June 1, 1935

April	3, 1935	Seattle	2 Hudsons
April	26, 1935	Vancouver	4 Hudsons
April	3, 1935	Yakima	7 Hudsons

After June 1, 1935

December	11, 1935	Seattle	1 Terraplane

MEXICO

July	31, 1934	Aguascalientes	2 Hudsons

[fol. 131] Applicant's Exhibit 10 was admitted in evidence. (It is contained in plaintiffs' Ex. 3 in this case.) Applicant's Exhibit 10 is a public liability and property damage and collision insurance policy issued May 28, 1934, by the Yorkshire Indemnity Co. of New Lork, to J n P. Fleming Driveaway Service. It provides protection in the operation of cars in the conduct of his driveaway business. This policy was cancelled by the company and was not in effect at the time of the hearing.

Applicant's Exhibit 11 (contained in plaintiffs' Ex. 3) was admitted in evidence for the purpose only of showing compliance with certain statutory provisions with respect to insurance. It is a "motor truck-cargo policy" issued by the Michigan Fire & Marine Insurance Co., on February 17, 1935, covering the John P. Fleming Driveaway Service as to his driveaway operations. To this policy is attached the endorsement required by the Michigan Public Utilities Commission as a condition to filing a policy with that Commission for motor carrier service under the jurisdiction of that Commission. This policy was cancelled by Fleming.

At the present time Fleming's operations are covered by public liability, property damage, collision, and $50 deductible fire and theft insurance. Counsel for Fleming was authorized by the Examiner to file Fleming's present policy with the Commission as evidence within ten days. (Pltfs. Ex. 2, pp. 23-29.)

I now have 190 or 200 sets of Michigan driveaway plates that I use in my operations. Some of the states recognize my Michigan driveaway plates as a matter of reciprocity but not all of them.

Exhibit 12 was admitted in evidence and is a certified copy of a certificate of registration for conducting business

under an assumed name executed by Fleming on June 22, 1934, and filed in the office of the County Clerk of Wayne County, Michigan, on July 3, 1934, the assumed name [fol. 132] being "John P. Fleming Driveaway Service".

I do not restrict my movement of automobiles to any particular make of car or to any particular individual or corporation as consignee. I have, prior to 1935 and up to the present time, held myself out as a common carrier of automobiles by the driveaway method. I have operated continuously since the filing of my federal application. (Pltfs. Ex. 2, pp. 30-32.)

Cross-examination.

(By Danial C. Rogers, Assistant Counsel of the Missouri Public Service Commission, representing that Commission and other protestants.)

(Public Service Commission of Missouri filed objections to granting of certificate, contained in plaintiffs' Ex. 1. The ground stated in the objection is that applicant Fleming stated in his application to the Interstate Commerce Commission that he operated or held himself out as a bona fide common carrier on June 1, 1935, within the State of Missouri; whereas, the records of the Public Service Commission of Missouri do not show that he was issued a permit to so operate or that he paid the taxes required of common carriers.)

I have been operating since 1932 holding myself out as a common carrier but I have no certificate as such. I have operated in 1934 and 1935 almost continuously through Missouri but not in 1936. I did not make deliveries in the State of Missouri. At the present time I am not operating through Missouri. When I go to Texas or Oklahoma I do not go through Missouri. It is just as near to east of Texas to the points of delivery through Kentucky and Arkansas as it is through Missouri, and it is a more desirable route and I do not have a Missouri permit at this time. However, I have applied to counsel in Missouri to secure me that permit. I concede that the Missouri Public Service Commission holds that it has authority under the Missouri Bus and Truck Act of 1931, to regulate my operations as described [fol. 133] in this application. (Pltfs. Ex. 2, pp. 33-34.)

I wrote to a dealer and had him investigate, and he told me it looked as though at that time there was no requirement

in Missouri, that is the time I was operating through Missouri. He did say he made his investigation at Jefferson City and Joplin. He did not write to the Public Service Commission of Missouri and did not have any information from them. I am not familiar with the Missouri law. I wrote to a man in Jefferson City. He stated a permit is granted without any cost, from the Commission, but it requires my personal appearance before the Commission. For that reason I have not secured the permit. I have not time to appear before the Commission and my business at this time does not require me to travel through that state. I do not recall whether that gentleman informed me that the Missouri Commission permits interstate common carriers to operate through the state without paying fees.

Exhibit 13 was admitted in evidence (contained in plaintiffs' Ex. 3). It is a copy of the Missouri Bus and Truck law of 1931 and of General Order No. 27 containing the regulations of the Public Service Commission of Missouri. (Pltfs. Ex. 2, pp. 34-37.)

I concede that the Public Service Commission of Missouri was holding out that they had the right to regulate me as I operated in Missouri.

Protestant's Exhibit 14 (contained in plaintiffs' Ex. 3) was admitted in evidence. It is a certified copy of a report and order of the Missouri Public Service Commission dated December 24, 1935, in which the Commission holds that driveaway operations similar to those of applicant Fleming are subject to its jurisdiction.

I was never stopped by police officers in Missouri on the question of whether or not I was lawfully operating through Missouri.

[fol. 134] Q. Do I understand you to say that in its requirement, the Missouri Commission was such, you complied with the Missouri Bus Act of 1931, or you intended to do so?

A. Yes.

Q. And you paid the fees and complied otherwise with the law as it may be determined by the courts, with reference to the Missouri Bus and Truck Act?

A. That is right.

Q. You have not done that up to this time?

A. No.

I last operated in Missouri in 1935. I did operate frequently into or through Missouri between June 1, 1935 and

August, 1935. I have not operated to my knowledge through Missouri since August, 1935, but my operations are so extensive that it is possible that our caravans have passed through Missouri without my knowledge even since August, 1935. Since the Nebraska law was put in I believe some of our convoys enter Missouri from Iowa on Highway 71 and run south to St. Joseph and then proceed west across the river. It is quite likely that my operations have passed through Missouri since August, 1935. (Pltfs. Ex. 2, pp. 37-41.)

Cross-examination.

By Mr. Hayes, representing railroad protestants:

I am not now operating through Missouri. I am now seeking authority to operate through Missouri so far as this particular certificate is concerned.

Q. If under the law of Missouri you were required to have secured that permission, your operations through Missouri would have been in violation of the law, if that is the law?

A. Well, I may be confused, but I would say if that is the law, I have attempted and am willing to compiy with any provision of the Commission.

[fol. 135] I learned along in the forepart of 1936 that I was supposed to obtain authority from the Public Service Commission of Missouri and I have avoided the use of the highways of Missouri since that time.

I have filed fictitious name statements in Oregon and Alabama and no other states. (Pltfs. Ex. 2, pp. 41-44.)

In Oregon I made deliveries in 1935 at Portland, Klamath Falls, and Salem. On June 1, 1935, I was engaged in performing service and making deliveries into Seattle, Vancouver, and Aberdeen in Washington. I have only made two trips to Spokane and that was since June, 1935. When I started my operations were chiefly at first in the south and southeast and service into western territory is more or less recent. The bulk of my operations in the west are Hudson and Terraplane cars. (Pltfs. Ex. 2, pp. 52-55.)

I am familiar with the requirements of the law of Oregon for my operations. I secured a contract carrier permit from the Public Utilities Commission of the State of Oregon about January 10, 1936. I secured an Oregon dealers

license in 1935 for my automobiles. I did not secure any other permit or certificate for operation in the State of Oregon at any time prior to January 10, 1936.

When I take possession of cars for delivery from the point of manufacture to destination the title to the cars is in the dealer. The dealer is the one who employs me. I solicit the dealer for the business. (Pltfs. Ex. 2, pp. 56-57.)

Q. In no event are you still performing these services and transporting these cars where you are the owner of the vehicles?

A. Yes, I am. In my operation at this particular time I am the owner of vehicles when they pass through the State of Nebraska.

Q. You are the owner of the vehicles when they pass through the State of Nebraska, because by a ruling of the [fol. 136] Nebraska Department they require vehicles to be registered in the name of the owner and the plates can then be transferred from one vehicle to another by the mere payment of a $1.50 fee, is that right?

A. That is right.

Q. Then in order to save the necessity of buying new plates for any dealer and standing the expense of new plates, you contend that you are the owner of those vehicles when you pass through Nebraska?

A. In title, yes.

Q. In title? And where did you pay for it?

A. I didn't pay.

Q. As a matter of fact, you did not pay for them. You took a bill of sale to them?

A. No, I did not take a bill of sale.

Q. As a matter of fact, when you got to Nebraska you merely contended that you were the owner so that you might use these plates of John P. Fleming Driveaway?

A. That is entirely it, but in Nebraska they file applications, and this law only takes that, if this is the proper way, only in so far as we meet their requirements.

Q. Well, aside from that so-called arrangement in Nebraska, you are not the owner in any of the other states?

A. No.

I never was and do not hold myself out as a dealer in automobiles. I never engaged as a dealer in automobiles in Idaho where I had dealer's plates. I never have been engaged as a dealer of automobiles in Oregon, or at any place.

My contract with Cohen-Anderson Motor Co. of Portland is dated October 1, 1935, and it ran for a period of one year. Under that I agreed to transport vehicles at the rate of $70.00 per car plus taxation. Prior to October 1, 1935, in [fol. 137] operating in Oregon I bought the dealer plates and that was the only requirement they made on me in 1935.

Q. You were a contract carrier, held a contract carrier permit in Oregon, but you were not a common carrier, is that correct?

A. Correct. (Pltfs. Ex. 2, pp. 57-60.)

With my application for a contract carrier permit to operate in Oregon I filed a copy of my written contract with the Cohen-Anderson Motor Co., and I filed no other contract. On June 1, 1935, I was making deliveries at Salem, Oregon, to the Hudson dealer there. I have not made deliveries to Salem since June 1, 1935. For a time I was making deliveries at Klamath Falls, Oregon, but I am not making deliveries there now. At the present time I have no other consignee in Oregon than the Cohen-Anderson Motor Co. at Portland. We made a few deliveries of automobiles to the Karakeen Motor Co. at Portland subsequent to June 1, 1935. I do not remember the date. I made no report of that to the Public Utilities Commission of Oregon. My arrangement is all through Cohen-Anderson for the delivery of Hudsons and Terraplanes and it was prior to June 1, 1935, although according to directions I made a delivery to Klamath Falls or Salem. (Pltfs. Ex. 2, pp. 61-63.)

We secured our permit to operate through Nevada in March, 1936, our first shipment after securing the permit being 24 GMC trucks through Nevada. We sent through there in 1933 or 1934 but there was no tax requirement at that time. It is possible though, that I was not doing business through Nevada in 1935 and did not start again until March of 1936, whatever the records show on my business through there. I had a consignment of 21 Nash cars through there in May, 1936, a third consignment was June 17, 1936, Hudson, Terraplanes, and 13 later in June, 1936.

[fol. 138] I commenced operations this year (1936) with James F. Waters Corporation of San Francisco, dealer in De Soto cars.

Others we have delivered for in California are Earl C. Anthony and the Hudson Car Company. Earl C. Anthony was the Hudson Terraplane dealer in Los Angeles. He is

now handling another make of car and we are not delivering to him now. We ceased doing business with him in the spring of 1936. We started doing business with him in 1935, I am not sure whether it was prior to June 1 or just after, but it was in the summer of 1935.

We used Highway No. 30 for our operations. We paid no fees and had no certificates or permits for the movement of those vehicles through Nevada that we took to Oregon and then down. We moved through Nevada without paying any fees or charges or complying with the requirements of that law if they had any.

I know that we made a few deliveries for Earl C. Anthony in the summer of 1935 but I am not certain as to the date; I think we made about three deliveries, a small number of cars. It was more or less temporary, or a substitute arrangement. Anthony caravans most of his own cars and we helped out when he was not in shape to handle some of his own stuff.

In 1934 we had three shipments, and some in 1935, for the Brown Boyd Motor Company of Bakersfield, California, dealers in Hudson and Terraplane. We are not still doing business with them; that was an occasional shipment, it was not a regular continuous business. Since that time that company has convoyed its own vehicles.

Our most recent delivery in California has been for General Motors taxicabs, dealer cabs, last week (prior to June 23, 1936, the date of the hearing). I delivered some GMC trucks in California in February, 1936, but none prior to that time. In June of 1935, I was not engaged in the business of serving General Motors in the shipment of vehicles to California.

[fol. 139] I now seek authority to move freight through Utah, Nevada, and Idaho, in order to get cars to my three west coast states. I am not seeking authority to make deliveries in the intermediate states and I was not in June, 1935, engaged in that business. I do not want authority to serve Kansas, Oklahoma, Nebraska, Wyoming and Montana, but only want authority to move through those states. (Pltfs. Ex. 2, pp. 65-71.)

In the State of Texas we purchase a convoy permit at the port of entry each time we go in at a cost of $3.50 per car. I served used car dealers in Fort Worth, Texas in 1934; that was my first movement into Texas. I am not now handling used cars. I am not now engaged in handling that business

for those persons at Fort Worth. I serve the Automobile General Corporation of Dallas, dealers in Hudson Terraplanes, and the Hudson Terraplane dealer at Paris and Marshall in Texas. I had been serving the dealer at Dallas something like over a year, prior to June 1, 1935. I have a record of that. I began to serve the dealer at Paris and the dealer at Marshall subsequent to June 1, 1935. We have made deliveries on a few occasions to the Orsinger Motor Company at San Antonio, a Hudson Terraplane dealer. We are not now doing business with him. I believe we made two or three deliveries to him. I would say that his business was an open account on June 1, 1935. The last shipment I handled for him was sometime prior to June 1, 1935. We have not served any other dealers in San Antonio. I say the Orsinger Motor Company was an open account because we were holding ourselves ready to serve him because we had served him in the past, and we were ready to serve him. He was considered one of our standing accounts. I did not give consideration as to any definite time. Any time I do business with any one individual I am willing to do business with him again. I do have a very few written contracts with my customers, other than at Portland. I do not have a written contract with the Orsinger Motor Company. [fol. 140] I handled two or three small shipments for them. I believe those are about the only points in Texas that we served. We go there continuously, though, and have for some time.

We have three accounts in Old Mexico, which we are still serving, Caliente, Chihuahua and Monterey. I believe that was started in the early part of 1936, that is a new account.

In Arkansas we have one place in Texarkana, but we do not serve any other dealers in the state and were not in 1935. (Pltfs. Ex. 2, pp. 71-76.)

There are four or five methods of transportation of automobiles, by rail, by water, by truckaway, and by delivery under their own power, one in tow of another, and the full mount, one vehicle mounted on another. The delivery of vehicles is frequently accomplished by use of a combination of methods. My operation is for hire and I am engaged in the performance of a transportation service to deliver vehicles. I am engaged in a competitive operation with other types of transportation service. Less than five per cent of my operation is ac-omplished by the handling of just one vehicle in single units. I perform this service through the

employment of drivers to make deliveries. The percentage of the chassis I move from one point to another in the performance of the service of installation of bodies, and which in turn move to some other point, is a very small percentage, a small movement. The large percentage of my business is moving Hudson and Terraplane cars but we move many makes and many types. As far as western territory is concerned, during June of 1935 and subsequent to that time practically all of my operation has been in the handling of Hudson and Terraplane cars with some few minor exceptions. That was true on June 1, 1935. (Pltfs. Ex. 2, pp. 77-79.)

In Alabama I serve a Hudson Terraplane dealer named Cullman in Gadsden. I have been doing business with him since some time prior to June, 1935. This is my fourth year doing business for the distributor at Birmingham, a Hudson Terraplane dealer, and with the Hudson Terraplane dis-[fol. 141] tributor at Montgomery, The Hobby Motor Company. I have had a contract to deliver Packard cars at Montgomery for the past two years. Then there is the Apt Motor Company at Birmingham. I believe I do not serve any other consignees in Alabama but I am not positive.

In the State of Georgia we have many accounts. I cannot enumerate them all; the largest is J. W. Goldsmith at Atlanta, a Hudson Terraplane dealer. We deliver Dodge trucks at Savannah.

Q. Well, will you during the noon intermission prepare a list of consignees in Georgia for convenience here, and to save time, a list of consignees in Georgia and the dates when you began to serve them?

A. I would have to go to my files to do that.

Q. Would it be much trouble or inconvenience you to do that?

A. Well, I will call one of the clerks and see if I can get some information together at noon time.

We serve practically every city in South Carolina. Besides Hudsen and Terraplanes we deliver some Dodge trucks and Dodge and Plymouth cars. We deliver Grahams at Wilmington and Charleston. I will likewise bring a list of the consignees in South Carolina.

In North Carolina we deliver Grahams at Winston Salem, and Hudson Terraplanes in that state. (Pltfs. Ex. 2, pp. 81-84.)

Mr. Matheson: May we have one more day to produce all of that information? I am afraid that it will take some time to file and compile all of that, and we would like to have about ten days.

Examiner Later: Off the record.

(Discussion outside the record.)

The Witness: Well, I would say that some dealers come for their own automobiles.

Examiner Later: There is a question raised by counsel as to his being able to furnish all of that information you have [fol. 142] requested for today. Of course, the hearing is not going to last after today, so if he is not able to do so, he may furnish a copy for the record within ten days. Would that be satisfactory?

Mr. Hays: Yes, in so far as those states are concerned. I think it is pertinent information, and if the applicant could get that we would very much appreciate his attempt to do so, so that it could afford an opportunity for cross-examination if it were found to be advisable.

In Kentucky we serve accounts in Louisville and Williamsburg. We served them on June 1, 1935, and still serve them.

We have moved in Tennessee continuously; that was at the inception of my business.

I do not hold any service permits, special permits, or license plates in Georgia. I have not complied with the state requirements or statutes. In South Carolina I have not applied to that Commission as a common carrier and I do not hold any special service permit. I do not hold any special service permit for North Carolina, Tennessee, Kentucky, Virginia, or West Virginia. We pay a mileage tax in Tennessee on commercial cars and trucks. I have had no special fees and no permits from Indiana or Ohio. (Pltfs. Ex. 2, pp. 84-88.)

The number of my regular employees ranges between 60 and 100. I very seldom go on a trip myself. I put some one in charge of the caravan. In paying charges to the authorities of Nebraska we at first used travelers checks. At the present time I am paying by personal check. We formerly paid the State of Wyoming with travelers checks but we are so well acquainted that this year we have been using my own personal check. The convoy leader gets $60.00 for the trip, or more if the convoy is large. He is paid on a mileage

basis. Oils, gasoline and other supplies enroute are paid [fol. 143] for by my own check. The man in charge carries my check made to him and he endorses it to the service station. The convoy leader gets so much per trip and is in sole charge. He advances money to the drivers to the amount needed for their meals and expenses and obtains their receipt. The drivers are paid by the mile with the exception of the three most western states, which is by the trip. The driver on the Portland trip is paid $40.00. For return transportation, the convoy leader has a car equipped to accommodate six or seven men. When the convoy is in excess of 15 cars we at times employ an individual under contract to move two automobiles to the west coast and no return transportation is stipulated in the contract. A great many of our convoys to the west coast involve more than 15 cars. Our average convoy, our ideal convoy, is 17 cars. Very few convoys go through in larger numbers than 17; only at a certain period of the year, and that is when the dealers are stocking up. Our schedule to the west coast is eight days. A driver who is employed to go to the west coast and who is not to be returned is paid $40.00. He pays his own meals and lodging en route. There are persons frequently who are interested in going to the west coast and willing to drive out without my having to incur the expense of driving them back. The drivers are not advertised for. They are men who come and submit an application and leave it on file, and when the occasion arises we in turn will call them in. Our rate is $70.00 to Portland and $75.00 to Seattle, plus taxes we have to pay en route to various states. The rate on driving a single car is 70% of the rate for driving two. There is a difference for the heavier type of vehicles. (Pltfs. Ex. 2, pp. 110-114.)

Examination.

By L. E. Smith, Attorney for Interveners, Kenosha Auto Transport Corporation:

Before operating through Indiana I did not make any inquiry as to whether the laws or rules of the Indiana Com- [fol. 144] mission would apply to my operations.

Before starting a movement into a new territory, it is obvious from contact with other operators or dealers in the territory, what the requirements are, and if any state has a requirement that is of record, to my knowledge, it has been my policy to write for the rule of that particular state

through its proper department and inquire their demands. For instance, before starting my movement into Oregon I was told there was only one state required a license, and that was the State of Idaho. Before operating into any new state I have always made inquiry as to what the rules and laws were. Neither I nor my company nor any of my drivers have ever been arrested in any state for violating a law of the state pertaining to my operations or a rule or regulation of the State Utilities Commission.

I have on file with a very few State Utilities Commissions written contracts with some of my shippers. They are filed to comply with the rules and regulations of the State Commission. I do not recall any contract that has ever been required by a shipper. I have never represented my company to any shipper to be a contract carrier. I want the Commission to issue me a common carrier certificate. I have never refused a shipment if the rates were adequate. (Pltfs. Ex. 2, pp. 118-126.)

Cross-examination.

By Mr. Hays, Representing Intervening Railroads:

Before operating through Illinois we inquired of the State Highway Patrol as to what was required. I found out what was the general practice of all companies operating through the state and we proceeded to do likewise. I might say that in transporting automobiles through Illinois insofar as the enforcement agencies are concerned, there was no requirement that it was necessary that you have license plates because of reciprocity rights in Illinois. If you have license [fol. 145] plates from some other state that does not have reciprocity with Illinois you will be forced to buy an Illinois dealers license plate. I have never read the statutes of Illinois. My convoy leaders were instructed by the law enforcement agencies that we are complying with the law, on Highway No. 6, also on Highway No. 30. (Pltfs. Ex. 2, pp. 131-133.)

Frank A. Schotters, was sworn and testified as follows:

Direct examination.

By Mr. Matheson, Attorney for Fleming:

I am president and general manager of a body manufacturing concern located at Lansing, Michigan. Our only

business is the manufacturing of truck bodies. Our sales are nation-wide in scope and extent. They are liable to be to any firm, person or corporation anywhere in the United States. That raises a particular transportation problem for us. Due to the number of customers that we have and their location and the individual orders whereby large shipments cannot be made, they are all handled individually, that brings up the question of driveaway so far as we are concerned. We have a contract with a large operator, for instance, that has a nation-wide distribution. That is a certain product and we build the entire body requirements for that particular customer. We have close contact with all of the truck manufacturers whereby a chassis is released to us at the point of manufacture, and at that point we take care of the chassis and deliver it to our plant and put the body on the chassis and complete it, and then it is finally sent to destination on our billing, being a complete transaction from the time we pick up the chassis at the truck manufacturer until it is delivered to final destination, and of course there is a certain type of transportation required in getting it to its destinaton. We bill the customer not only for the actual cost of the body, but in addition, an extra item for transportation. We handle the transportation of the chassis to our plant and then the delivery, all [fol. 146] completed, to the customer. We act as a collecting agency for the transportation company in making completed delivery. We are not using the services of John P. Fleming, the applicant. Our needs are being served by Bernard Jenks Driveaway. 99% of the orders give us the method of transportation. We follow the route handling the chassis and completed units as specified by our customers. In some cases it is impossible to use any method of transportation other than the driveaway method. You take trailer bodies, where they have van bodies to transport, it would be impossible to transport them by rail, and, another thing, we find that in the handling where you send bodies to any destination the L. C. L. cost would be prohibitive, and we find that is one of the reasons why driveaway is being used to destinations outside a certain radius. We do not use the towbar method in making deliveries. The dimensions of some of these vehicles and the cost of loading prohibit any other method of transportation. Shipments going to the western coast, we ship by rail to Baltimore, then by boat to the western coast, and those delivered inland by drive-

away. We regard the driveaway method of delivery as a distinct form of transportation. (Pltfs. Ex. 2, pp. 93-99.)

DANIEL C. ROGERS, was sworn and testified as follows:

Direct examination.

By Mr. Matheson, Attorney for Fleming:

Exhibit No. 14 (part of plaintiffs' Ex. 3) was issued on December 24, 1935. That was the first order issued in any convoy case by the Public Service Commission of Missouri. The question whether the Commission intended to cover driveaway operations as such was under discussion for some weeks or months prior to the issuance of this order. (Pltfs. Ex. 2, pp. 136-137.)

[fol. 147] PLAINTIFF'S EXHIBIT NO. 4

(Digest of Fleming's supplemental list of shipments filed by Fleming with the Interstate Commerce Commission on August 16, 1936, pursuant to agreement of counsel. This supplemental list is plaintiffs' exhibit 4, but is here rearranged to show shipments by destination states and by dates.)

ALABAMA

Shipments on or before June 1, 1935

July	14, 1934	Birmingham	4	Vehicles
August	17, 1934	"	12	"
August	18, 1934	"	8	"
September	7, 1934	"	4	"
September	27, 1934	"	4	"
March	29, 1935	"	4	"
May	9, 1935	"	4	"
May	20, 1935	"	6	"

Shipments after June 1, 1935

August	6, 1935	Bessemer	4	"
January	26, 1936	"	2	"
April	11, 1936	"	2	"
April	22, 1936	"	2	"

ALABAMA—Shipments after June 1, 1935—Continued

June	6, 1935	Birmingham	8	"
August	13, 1935	"	5	"
September	10, 1935	"	2	"
November	6, 1935	"	2	"
December	1, 1935	"	2	"
December	12, 1935	"	5	"
January	3, 1936	"	1	"
June	13, 1936	"	1	"
June	25, 1936	"	3	"
July	13, 1936	"	8	"
July	14, 1936	"	9	"
March	12, 1936	Cullman	4	"
November	13, 1935	Gadsden	4	"
December	27, 1935	"	2	"
February	21, 1936	"	2	"
May	7, 1936	"	6	"
July	18, 1935	Montgomery	4	"
November	16, 1935	"	4	"
December	20, 1935	"	4	"
June	2, 1936	"	3	"
July	24, 1936	"	8	"

ARKANSAS

Shipments on or before June 1, 1935

March	9, 1935	Texarkana	5	Vehicles
May	12, 1935	"	15	"

No later shipments

CALIFORNIA

Shipments after June 1, 1935

December	11, 1935	San Francisco	2 Vehicles

[fol. 148]

GEORGIA

Shipments on or before June 1, 1935

July	23, 1934	Albany	7	Vehicles
January	19, 1935	"	4	"
January	31, 1935	"	2	"
August	23, 1933	Atlanta	4	"
September	27, 1933	"	4	"
October	31, 1933	"	4	"
November	12, 1933	"	4	"
December	12, 1933	"	2	"
January	5, 1934	"	2	"
January	16, 1934	"	6	"
January	4, 1934	"	10	"
May	17, 1934	"	11	"

GEORGIA—Shipments on or before June 1, 1935—Continued

June	8, 1934	Atlanta	11	"
June	15, 1934	"	11	"
July	19, 1934	"	9	"
August	6, 1934	"	4	"
August	17, 1934	"	9	"
August	24, 1934	"	4	"
August	24, 1934	"	13	"
September	14, 1934	"	10	"
September	20, 1934	"	4	"
September	26, 1934	"	10	"
October	6, 1934	"	6	"
October	19, 1934	"	15	"
December	6, 1934	"	2	"
December	7, 1934	"	2	"
December	14, 1934	"	11	"
December	21, 1934	"	1	"
December	29, 1934	"	11	"
December	31, 1934	"	4	"
January	21, 1935	"	9	"
February	1, 1935	"	12	"
April	26, 1935	"	12	"
May	29, 1935	"	1	"
November	14, 1933	Augusta	2	"
December	16, 1933	"	4	"
August	7, 1934	"	4	"
February	6, 1935	"	2	"
August	14, 1934	Columbus	4	"
February	19, 1935	"	6	"
April	30, 1935	"	4	"
June	27, 1933	Gainesville	2	"
June	15, 1934	Macon	4	"
August	1, 1934	"	4	"
August	30, 1934	"	4	"
January	9, 1935	"	5	"
May	29, 1935	"	2	"
January	16, 1935	Rome	4	"
February	15, 1935	"	2	"
December	24, 1934	Savannah	5	"
January	18, 1935	"	6	"
May	11, 1935	"	2	"
May	15, 1935	"	2	"

Shipments after June 1, 1935

June	21, 1935	Albany	2	Vehicles
May	8, 1936	"	4	"
August	15, 1935	Atlanta	3	"
November	8, 1935	"	3	"

GEORGIA—Shipments after June 1, 1935—Continued

[fol. 149] Shipments after June 1, 1935

April	3, 1936	Atlanta	6 Vehicles
April	22, 1936	"	3 "
June	6, 1936	"	3 "
June	19, 1936	"	4 "
June	30, 1936	"	1 "
July	24, 1936	"	5 "
June	21, 1935	Augusta	4 "
July	24, 1936	Bremen	2 "
January	25, 1936	Columbus	6 "
July	14, 1936	Douglas	2 "
October	25, 1935	Gainesville	4 "
October	29, 1935	Griffin	4 "
February	6, 1936	"	2 "
August	20, 1935	Macon	2 "
November	14, 1935	"	4 "
December	4, 1935	"	4 "
February	14, 1936	"	2 "
April	16, 1936	"	2 "
July	9, 1936	Ocilla	2 "
August	6, 1935	Rome	2 "
June	3, 1935	Savannah	2 "
June	19, 1935	"	4 "
July	18, 1935	"	4 "
October	14, 1935	"	2 "
November	22, 1935	"	4 "
December	12, 1935	"	1 "
January	4, 1936	"	4 "
March	10, 1936	"	4 "
April	15, 1936	"	1 "
May	11, 1936	"	9 "
July	9, 1936	"	2 "
July	15, 1936	"	2 "

KENTUCKY

Shipments on or before June 1, 1935

April	17, 1935	Corbin	2 Vehicles
June	15, 1934	Louisville	1 "
September	1, 1933	Williamsburg	2 "
October	23, 1933	"	2 "
December	9, 1933	"	2 "
December	27, 1933	"	2 "
August	28, 1934	"	3 "
October	11, 1934	"	1 "
December	29, 1934	"	2 "
March	2, 1935	"	1 "
May	7, 1935	"	4 "
May	29, 1935	"	1 "

KENTUCKY—Shipments after June 1, 1935—Continued

Shipments after June 1, 1935

June	7, 1935	Corbin	1	Vehicle
February	12, 1936	Louisville	1	"
July	3, 1935	Williamsburg	1	"
August	14, 1935	"	2	"
October	8, 1935	"	1	"
November	16, 1935	"	1	"
December	6, 1935	"	1	"
December	18, 1935	"	3	"

[fol. 150] Shipments after June 1, 1935

January	17, 1936	Williamsburg	2	Vehicles
February	8, 1936	"	1	"
March	4, 1936	"	1	"
April	7, 1936	"	2	"
April	17, 1936	"	1	"
May	2, 1936	"	1	"
June	20, 1936	"	1	"
July	10, 1936	"	3	"
July	18, 1936	"	2	"

NORTH CAROLINA

Shipments on or before June 1, 1935

May	17, 1934	Asheville	2	Vehicles
December	27, 1934	"	4	"
January	22, 1935	"	2	"
February	25, 1935	"	2	"
April	18, 1935	"	4	"
January	15, 1935	Charlotte	9	"
January	22, 1935	"	10	"
April	22, 1935	Raleigh	5	"
May	29, 1935	"	12	"

Shipments after June 1, 1935

July	12, 1935	Asheville	2	Vehicles
October	31, 1935	"	4	"
December	12, 1935	"	10	"
March	20, 1936	"	2	"
April	23, 1936	"	2	"
June	11, 1936	"	2	"
November	6, 1935	Charlotte	10	"
November	14, 1935	"	4	"
December	3, 1935	"	5	"
December	9, 1935	"	2	"
December	31, 1935	"	2	"
February	27, 1936	"	4	"
April	17, 1936	"	10	"
May	14, 1936	"	2	"
June	17, 1936	"	2	"

NORTH CAROLINA—Shipments after June 1, 1935—Continued

November	9, 1935	Hickory	4	"
November	15, 1935	High Point	4	"
January	7, 1936	"	4	"
July	11, 1936	Lexington	2	"
January	27, 1936	Marshall	1	"
August	7, 1935	Raleigh	4	"
August	22, 1935	"	4	"
October	16, 1935	"	4	"
March	31, 1936	Salisbury	2	"
June	20, 1936	"	2	"
April	30, 1936	Statesville	2	"
October	12, 1935	Wilmington	2	"
November	15, 1935	"	4	"
February	7, 1936	"	2	"
May	21, 1936	"	4	"
July	2, 1936	"	2	"
July	5, 1936	Wilson	4	"
November	23, 1935	Winston-Salem	3	"
December	20, 1935	"	2	"
April	11, 1936	"	1	"
July	23, 1936	"	2	"

[fol. 151]

OREGON

Shipments on or before June 1, 1935

April	12, 1935	Eugene	4	Vehicles
April	12, 1935	Klamath Falls	4	"

No later shipments

SOUTH CAROLINA

Shipments on or before June 1, 1935

April	3, 1935	Anderson	2	Vehicles
July	14, 1933	Charleston	4	"
November	30, 1933	"	2	"
April	22, 1933	Columbia	2	"
May	3, 1933	"	2	"
May	26, 1933	"	9	"
July	4, 1933	"	9	"
July	25, 1933	"	9	"
September	8, 1933	"	9	"
October	18, 1933	"	9	"
November	6, 1933	"	2	"
November	30, 1933	"	2	"
December	12, 1933	"	2	"
December	29, 1933	"	6	"
January	12, 1934	"	2	"
March	8, 1934	"	4	"
April	4, 1934	"	11	"

SOUTH CAROLINA—Shipments on or before June 1, 1935—Continued

April	10, 1934	Columbia	6	"
April	18, 1934	"	3	"
April	18, 1934	"	8	"
April	19, 1934	"	4	"
April	22, 1934	"	8	"
April	27, 1934	"	9	"
May	2, 1934	"	2	"
May	2, 1934	"	11	"
May	8, 1934	"	4	"
May	11, 1934	"	9	"
May	11, 1934	"	2	"
May	19, 1934	"	5	"
May	29, 1934	"	10	"
June	21, 1934	"	9	"
August	1, 1934	"	9	"
August	20, 1934	"	6	"
August	24, 1934	"	5	"
August	29, 1934	"	9	"
September	7, 1934	"	9	"
September	19, 1934	"	9	"
October	3, 1934	"	9	"
October	20, 1934	"	9	"
November	27, 1934	"	4	"
December	5, 1934	"	4	"
December	11, 1934	"	4	"
December	16, 1934	"	4	"
May	3, 1935	"	11	"
May	16, 1935	"	9	"
April	4, 1935	Greenwood	2	"
April	25, 1934	Hartsville	11	"
May	18, 1934	"	9	"
July	27, 1934	"	9	"
December	11, 1934	"	4	"
January	30, 1935	"	9	"
February	15, 1935	"	4	"
September	13, 1934	Lake City	2	"

[fol. 152] Shipments after June 1, 1935

November	8, 1935	Anderson	4	Vehicles
July	16, 1935	Columbia	9	"
October	5, 1935	"	2	"
November	8, 1935	"	5	"
January	1, 1936	"	2	"
March	18, 1936	"	1	"
April	4, 1936	"	3	"
April	28, 1936	"	9	"
July	10, 1936	"	9	"
July	14, 1936	"	11	"
January	31, 1936	Greenville	4	"

SOUTH CAROLINA—Shipments after June 1, 1935—Continued

June	10, 1935	Hartsville	6	"
November	14, 1935	"	7	"
November	27, 1935	"	5	"
December	28, 1935	"	2	"
February	19, 1936	"	9	"
April	23, 1936	"	2	"
July	1, 1936	"	2	"
June	25, 1936	Spartanburg	2	"
July	11, 1936	"	2	"

TENNESSEE

Shipments on or before June 1, 1935

December	14, 1934	Chattanooga	4	Vehicles
December	21, 1934	"	4	"
January	3, 1935	"	4	"
February	14, 1935	"	4	"
April	13, 1935	"	2	"
May	16, 1935	"	2	"
June	12, 1933	Knoxville	4	"
July	10, 1933	"	2	"
August	12, 1933	"	2	"
September	12, 1933	"	2	"
October	27, 1933	"	2	"
November	27, 1933	"	4	"
December	20, 1933	"	2	"
January	8, 1934	"	2	"
May	16, 1934	"	8	"
May	19, 1934	"	2	"
May	23, 1934	"	2	"
June	19, 1934	"	4	"
June	26, 1934	"	4	"
June	28, 1934	"	6	"
July	27, 1934	"	4	"
July	31, 1934	"	4	"
August	7, 1934	"	8	"
August	28, 1934	"	4	"
September	27, 1934	"	2	"
October	11, 1934	"	2	"
October	16, 1934	"	4	"
October	29, 1934	"	2	"
November	5, 1934	"	2	"
November	13, 1934	"	2	"
November	28, 1934	"	6	"
November	30, 1934	"	6	"
December	5, 1934	"	4	"
December	13, 1934	"	8	"
December	24, 1934	"	6	"
December	28, 1934	"	4	"
January	18, 1935	"	5	"
February	7, 1935	"	4	"
February	20, 1935	"	2	"
April	20, 1935	"	8	"

TENNESSEE—Shipments after June 1, 1935—Continued

[fol. 153] Shipments after June 1, 1935

June	7, 1935	Chattanooga	2	Vehicles
June	28, 1935	"	1	"
July	15, 1935	"	2	"
August	2, 1935	"	2	"
November	14, 1935	"	4	"
November	30, 1935	"	4	"
December	28, 1935	"	4	"
April	18, 1936	"	4	"
May	15, 1936	"	2	"
June	24, 1936	"	2	"
July	15, 1936	"	2	"
June	17, 1936	Elizabethton	2	"
July	9, 1935	Kingsport	2	"
July	16, 1935	"	2	"
December	14, 1935	"	2	"
July	7, 1935	Knoxville	2	"
July	17, 1935	"	2	"
August	12, 1935	"	2	"
December	11, 1935	"	6	"
January	9, 1936	"	4	"
February	27, 1936	"	4	"
April	1, 1936	"	4	"
April	11, 1936	"	2	"
April	28, 1936	"	2	"
October	8, 1935	Nashville	4	"

TEXAS

Shipments on or before June 1, 1935

April	22, 1935	Ennis	2	Vehicles
May	17, 1933	Ft. Worth	2	"
July	20, 1933	"	12	"
December	18, 1933	"	2	"
May	8, 1935	"	6	"
October	4, 1933	Itasca	2	"
November	16, 1933	"	2	"
February	16, 1935	San Antonio	2	"

Shipments after June 1, 1935

April	1, 1936	Colorado	2	Vehicles
July	31, 1935	Laredo	2	"
January	14, 1936	"	4	"
January	28, 1936	"	7	"
March	2, 1936	"	2	"
May	15, 1936	"	5	"
July	15, 1936	"	4	"
December	14, 1935	Marshall	4	"
February	1, 1936	"	5	"
July	10, 1936	"	6	"
July	15, 1936	"	2	"

TEXAS—Shipments after June 1, 1935—Continued

January	3, 1936	Paris	4	"
July	16, 1936	"	4	"
May	1, 1936	Sherman	4	"
November	13, 1935	Tyler	4	"
November	23, 1935	"	4	"
December	5, 1935	"	6	"
December	21, 1935	"	4	"
January	3, 1936	"	4	"
April	10, 1936	"	4	"

[fol. 154] WASHINGTON

Shipments on or before June 1, 1935

May	9, 1935	Vancouver	4	Vehicles
February	28, 1935	Yakima	10	"

Shipments after June 1, 1935

February	14, 1936	Seattle	6	Vehicles

[fol. 155] PLAINTIFF'S EXHIBIT NO. 5

Stipulation

Each of the plaintiffs is a common carrier of property by railroad and each of the plaintiffs is either a corporation duly organized and existing, or trustees or receivers duly appointed and qualified of railroad corporations, as is more specifically set out in the caption of "Plaintiffs' Complaint".

For more than five (5) years last past, one or more of the plaintiffs have been engaged in carrying, or have been participating in the carriage of, new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, as common carriers of property, in interstate commerce, from Detroit, Michigan for delivery to all railroad stations and other points served by plaintiffs in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington; and that one or more of the plaintiffs are so engaged at the present time. The amount of traffic so handled by the plaintiffs has been and is now substantial.

(Signed by all of the parties, plaintiffs and defendants, by their counsel.)

[fol. 156] CERTIFICATE OF COUNSEL

I hereby certify that the foregoing is a true and correct abstract of all of the evidence offered or received in the District Court in this cause which is material to the questions presented upon this appeal.

Dated April 24, 1941.

Amos M. Mathews, Attorney for Plaintiffs, Appellants.

[fol. 157] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFF'S PRAECIPE FOR RECORD—Filed April 28, 1941

To the Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division:

For the purpose of the record on appeal in the above entitled cause, please prepare, certify and transmit to the Clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

1. Plaintiffs' complaint.
2. Answer of defendant, United States of America.
3. Answer of defendant, Interstate Commerce Commission, and amendment thereto filed on November 26, 1940.
4. Answer of defendant, John P. Fleming, etc.
5. Opinion of the Court, dated January 31, 1941. (This is a part of the statement as to jurisdiction.)
6. Judgment and decree, dated April 7, 1941.
7. Statement of the evidence filed by plaintiffs, and proof of service thereof upon defendants.

[fols. 158-170] 8. Petition for appeal to Supreme Court.

9. Assignment of errors and prayer for reversal.
10. Statement as to jurisdiction of the Supreme Court.
11. Order allowing appeal to Supreme Court of the United States.
12. Notice and proof of service upon defendants of copies of the petition for appeal, assignment of errors, statement as to jurisdiction, and order allowing appeal.
13. Citation with acceptance of service.

14. Cost bond on appeal.
15. This praecipe, and proof of service thereof.

Dated this 24th day of April, 1941.

Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs.

NOTICES OF FILING OF STATEMENT OF EVIDENCE AND ACKNOWLEDGMENTS OF SERVICE OF PRAECIPE FOR RECORD OMITTED IN PRINTING

[fols. 171-175] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 176] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR CROSS APPEAL—Filed June 6, 1941

The United States of America, Interstate Commerce Commission and John P. Fleming, defendants in the above-entitled cause, feeling themselves aggrieved by the failure and refusal of the Court to dismiss the above-styled complaint because of lack of standing in the plaintiffs to bring and maintain said suit, and further aggrieved by that part of the final decree entered herein by this Court on April 7, 1941, which purports to annul in part the order of the Interstate Commerce Commission dated September 19, 1938, in proceeding styled *John P. Fleming Common Carrier Application*, No. MC 48654, to the extent of excluding from said report and order the authority therein granted to [fol. 177] transport property from Detroit, Mich., on the one hand, to any points in the State of Arkansas, on the other, and permanently enjoining said John P. Fleming from so operating under the authority of said report and order, pray a cross-appeal from said portion of said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference in hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered be duly authenticated and transmitted forthwith to the Supreme Court of the United States.

Dated June 6th, 1941.

John C. Lehr, United States Attorney; Thurman Arnold, Assistant Attorney General; Frank Coleman, Special Assistant to the Attorney General, For the United States of America; Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Attorney, for Interstate Commerce Commission; George S. Dixon, Attorney for John P. Fleming.

[fol. 178] In the District Court of the United States

[Title omitted]

Order Allowing Cross-Appeal—Entered June 6, 1941

On this day came the above-named defendants, by their attorneys, and presented their petition for cross-appeal and their assignment of errors, together with a jurisdictional statement in accordance with the Revised Rules of the Supreme Court of the United States, which have been duly filed, and upon consideration thereof it is

Ordered And Adjudged that a cross-appeal to the Supreme Court of the United States from the final decree heretofore entered in the above-entitled cause on the 7th day of April 1941, and from the portion thereof granting the prayer of the plaintiffs' complaint, to the extent and in the manner set out in said decree, be, and it hereby is, allowed to said defendants; that a certified transcript of the [fol. 179] record herein be transmitted in due course to the Supreme Court of the United States.

Dated June 6, 1941.

Edward J. Moinet, Judge.

[fol. 180] In the District Court of the United States

[Title omitted]

Assignment of Errors on Cross-Appeal—Filed June 6, 1941

The United States of America, Interstate Commerce Commission and John P. Fleming object and except to the fol-

lowing actions of the Court in the above-styled cause in connection with its final decree, opinion, findings of fact and conclusions of law and file the following assignment of errors with and as a part of their petition for cross-appeal to the Supreme Court of the United States from the action and decree of the District Court entered April 7, 1941, in said cause:

The District Court committed error—

1. In failing and refusing to dismiss the above-styled cause upon the ground that no plaintiffs have standing to [fol. 181] institute or maintain the suit since no one of the plaintiffs has any legal right of interest which is or would be affected, violated or of which a plaintiff would be deprived by the order of the Interstate Commerce Commission complained of.

2. In entering decree annuling in part the order of the Interstate Commerce Commission and enjoining defendant Fleming from operating with respect to the State of Arkansas under authority of the Commission's report and order.

3. In weighing the evidence heard by the Commission and making a statement of fact in its opinion relative to operations in the State of Arkansas that the applicant Fleming's testimony supports a conclusion that in that State his operations had been abandoned when upon substantial evidence before it the Commission had reached the conclusion that Fleming's operations in Arkansas had not been abandoned.

4. In granting to the extent above stated the prayer of plaintiff's complaint upon the statement of facts made in the Court's opinion and findings of fact, instead of denying it altogether.

5. In failing to find that upon the facts stated in the Commission's report the Commission's order was in all respects valid and should be sustained in toto.

6. In failing to find that the facts stated in the Commission's report were supported by substantial evidence in [fol. 182] the Commission record and that said facts and

the findings of the Commission in its report were sufficient in law to support the Commission's order in all respects.

John C. Lehr, United States Attorney; Thurman Arnold, Assistant Attorney General; Frank Coleman, Special Assistant to the Attorney General, For the United States of America; Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Attorney, For Interstate Commerce Commission; George S. Dixon, Attorney for John P. Fleming.

[fols. 183-187] Citation in usual form showing service on Amos M. Mathews, omitted in printing.

[fol. 188] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CROSS APPELLANTS' PRAECIPE FOR RECORD—Filed June 24, 1941

To the Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division:

For the purpose of the record on cross appeal in the above entitled cause, please prepare, certify and transmit to the Clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

1. All of the documents (with the exception of "Citation" and "Cost Bond on Appeal") listed in praecipe heretofore filed with you by appellants, The Alton Railroad Company et al., for the purposes of the direct appeal. [In the event you prepare, certify and transmit transcript of the documents so listed pursuant to said praecipe, duplication for the purposes of this praecipe will be unnecessary.]

2. Petition for Cross Appeal in the Supreme Court.

3. Cross appellants' Assignment of Errors.

4. Cross appellants' Statement as to Jurisdiction.

[fol. 189] 5. Order Allowing Cross Appeal.

6. Acceptance of Service upon appellants of copies of Petition for Cross Appeal, Assignment of Errors, Statement as to Jurisdiction and Order Allowing Cross Appeal.

7. Citation on Cross Appeal with Acceptance of Service.

8. This praecipe and proof of service thereof.

9. Please transmit to the Clerk of the Supreme Court of the United States the originals of the exhibits introduced in evidence at the trial of this cause in the district court, pursuant to a stipulation approved by the district court heretofore filed with you.

10. Copy of stipulation relative to the transmission of said original exhibits.

Dated this 18th day of June, 1941.

United States of America, by Thurman Arnold, Assistant Attorney General; John C. Lehr, United States Attorney; Frank Coleman, Special Assistant to the Attorney General; Interstate Commerce Commission, by Nelson Thomas, Its Attorney; John P. Fleming, an Individual, Doing Business as John P. Fleming Driveaway Service, by George S. Dixon, His Attorney.

[fol. 190] Service of the foregoing praecipe on cross appeal is hereby acknowledged.

The Alton Railroad Company et al., Plaintiffs, by Amos M. Mathews, Their Attorney.

Dates this 21 day of June, 1941.

[fols. 191-194] Clerk's Certificate to foregoing cross appeal papers omitted in printing.

[fol. 195] IN THE SUPREME COURT OF THE UNITED STATES

No. 110, Oct. Term

THE ALTON RAILROAD COMPANY, et al., Appellants,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and John P. Fleming, an Individual, Doing Business as John P. Fleming Driveaway Service, Appellees

STATEMENT OF THE POINTS INTENDED TO BE RELIED UPON BY APPELLANTS, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 9, 1941

I

The points to be relied upon by appellants are the assignments of error included in the transcript of record from the District Court.

II

The parts of the record necessary for the consideration of said points and which should be printed are:

All of the transcript of record filed by the appellants in the Supreme Court except the citation and cost bond. The opinion of the Court should be printed as a part of the Record, in addition to its printing as part of the statement as to jurisdiction.

Dated this 31st day of May, 1941.

Amos M. Mathews, Attorney for Appellants.

[fols. 196-200] STATE OF ILLINOIS,
County of Cook, ss:

Affidavit

I, Eleanor Walter, being duly sworn do on oath state:

That, on the 2nd day of June, 1941, I mailed copies of the foregoing statement and designation to the following named attorneys for the appellees by register l United States mail, return receipts requested, and there are attached to this

affidavit the receipts received from the said attorneys pursuant to said mailing:

Mr. Frank Coleman, Special Assistant to the Attorney General, Washington, D. C.

Mr. Nelson Thomas, Attorney Interstate Commerce Commission, Washington, D. C.

Mr. George S. Dixon, Attorney at Law, Penobscot Building, Detroit, Michigan.

Eleanor Walter.

Subscribed and sworn to before me by the said Eleanor Walter this 6th day of June, 1941. A. F. Hucksold, Notary Public. (Seal.)

[fol. 201] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 267

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and John P. Fleming, an Individual, Doing Business as oJhn P. Fleming Driveaway Service, *Cross-Appellants*,

vs.

THE ALTON RAILROAD COMPANY et al., *Cross-Appellees*

STATEMENT OF POINTS INTENDED TO BE RELIED UPON BY THE CROSS-APPELLANTS AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 16, 1941

I

The points to be relied upon by cross-appellants are the Assignments of Error stated in the "Assignment of Errors on Cross-Appeal", included in the transcript of record as called for in item 3 of Praecipe for Transcript of Record heretofore filed by the above-named cross-appellants.

II

The parts of the record necessary for consideration of said points and which should be printed are all the portions of the transcript of record already designated for

printing by the appellants (cross-appellees), with the addition of the following portions of the record which are called for by the cross-appellants in their "Praecipe for Transcript of Record", to wit:

[fols. 202-203] Petition for Cross-Appeal
Cross-Appellants' Assignment of Errors
Order Allowing Cross-Appeal
Citation on Cross-Appeal
Cross-Appellants' Praecipe for Transcript of Record
This Statement of Points intended to be Relied Upon by the Cross-Appellants and Designation of the Parts of the Record to be Printed.

(If any of the above items are to be printed pursuant to designation by appellants (cross-appellees), duplication for the purposes of this cross-appeal will be unnecessary.)

United States of America, by Charles Fahy, Acting Solicitor General; Thurman Arnold, Assistant Attorney General; John C. Lehr, United Sates Attorney; Frank Coleman, Special Assistant to Attorney General. Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Its Attorney. John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, by George S. Dixon, His Attorney.

[fols. 204-205] CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a true copy of the attached Statement to Amos M. Mathews, Esq., Attorney for The Alton Railroad Company et al., Appellants and Cross-Appellees, at 517 W. Adams Street, Chicago, Illinois.

Frank Coleman, Special Assistant to the Attorney General.

September 15, 1941.

Endorsed on Cover: File No. 45,438, 45,595. E. Michigan, D. C. U. S., Term No. 110, The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Charles M. Thomson, Trustee of Chicago and Eastern

Illinois Railway Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service. Term No. 267, The United States of America, Interstate Commerce Commission, and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service, Appellants, vs. The Alton Railroad Company, et al. Filed May 29, 1941, July 12, 1941. Term No. 110 O. T. 1941, 267 O. T. 1941.

(7147)